(49)

No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX
Volume I

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NOTICE

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United States District Court
for the Central District of California
Docket Number 2:01-cv-08541-SVW-FMO
Metro-Goldwyn-Mayer, et al. v. Grokster Ltd et al.

7/12/2002	1st AMENDED COMPLAINT by Plaintiffs
7/24/2002	ANSWER filed by Defendant Grokster Ltd to First Amended Complaint
7/24/2002	FIRST AMENDED ANSWER by Defendant MusicCity.com Inc. and MusicCity Networks
9/9/2002	NOTICE OF MOTION AND MOTION by Defendant Grokster Ltd for Summary Judgment on the Ground that there is Not Genuine Issue as to any Material Fact and that the Moving Party is Entitled to Judgment
9/9/2002	MEMORANDUM by Defendant Grokster Ltd in Support of Motion for Summary Judgment
9/9/2002	NOTICE OF MOTION AND MOTION by Defendant MusicCity Network Inc. for Partial Summary Judgment on the Issue of Contributory Infringement Liability with Respect to Distribution to the General Public of the Morpheus 2.0 Software Program
9/9/2002	MEMORANDUM by Defendant MusicCity Network Inc. in Support of Motion for Partial Summary Judgment

9/9/2002	NOTICE OF MOTION AND MOTION by Defendant Grokster Ltd for Partial Summary Judgment on the Issue of Vicarious Copyright Infringement Liability with Respect to Distribution to the General Public of the Morpheus 2.0 software program
9/9/2002	MEMORANDUM by Defendant Grokster Ltd in Support of Motion for Summary Judgment
9/9/2002	NOTICE OF MOTION AND MOTION by Plaintiffs for Summary Judgment Against Defendants StreamCast Networks f/k/a MusicCity.com, Inc., Grokster and Kazaa BV f/k/a Consumer Empowerment BV a/k/a FastTrack, or alter for Partial Summary Judgment
10/15/2002	MEMORANDUM by Plaintiffs' in Opposition to Defendants' Motions for Summary Judgment
10/21/2002	MEMORANDUM by Defendants Grokster for Summary Judgment
10/21/2002	MEMORANDUM by Defendants MusicCity Networks, Inc. in Opposition to Plaintiffs Motion for Summary Judgment or, Alternatively, Partial Summary Judgment; Statement of Genuine Issues of Material Fact in Opposition to Plaintiffs Motion for Summary Judgment on Liability
11/4/2002	REPLY by Defendant Grokster Ltd. Memorandum in Support for Motion for Summary Judgment

11/4/2002	REPLY by Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment
4/25/2003	ORDER by Judge Wilson Granting defendants motions for summary judgment and denying plaintiffs motion for summary judgment with respect to defendants Grokster and StreamCast Networks
6/18/2003	Order by Judge Wilson: directing entry of partial final judgment and alternatively certifying April 25, 2003 order for immediate appeal. The Court HEREBY DIRECTS entry of final judgment as to plaintiff's claims concerning the current versions of defendants. Grokster and StreamCast's respective products and services. The Court HEREBY AMENDS the April 25order as otherwise amended herein, to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)
6/27/2003	AMENDED NOTICE OF APPEAL by Plaintiff Jerry Leiber et al. to 9th Circuit Court of Appeals from District Court order entered June 18, 2003
7/10/2003	AMENDED NOTICE OF APPEAL by Plaintiffs Metro-Goldwyn-Mayer to 9th Circuit Court of Appeals from District Court order entered June 18, 2003

United States District Court
for the Central District of California
Docket Number 2:01-cv-09923-SVW-FMO
Jerry Leiber, et al. v. Consumer Empowerment et al.

7/12/2002	1st AMENDED COMPLAINT by Plaintiffs
7/24/2002	ANSWER filed by Defendant Grokster Ltd to First Amended Complaint
7/24/2002	FIRST AMENDED ANSWER by Defendant MusicCity.com Inc. and MusicCity Networks
9/11/2002	NOTICE OR MOTION AND MOTION by Plaintiffs for Summary Judgment against Defendants StreamCast Networks, MusicCity Networks, Inc., Grokster Ltd. and Kazaa
4/25/2003	ORDER by Judge Wilson Granting defendants motions for summary judgment and denying plaintiffs motion for summary judgment with respect to defendants Grokster and StreamCast Networks
6/18/2003	Order by Judge Wilson: directing entry of partial final judgment and alternatively certifying April 25, 2003 order for immediate appeal. The Court HEREBY DIRECTS entry of final judgment as to plaintiff's claims concerning the current versions of defendants. Grokster and StreamCast's respective products and services. The Court HEREBY AMENDS the April 25order as otherwise amended herein, to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)

6/27/2003	AMENDED NOTICE OF APPEAL by Plaintiff Jerry Leiber et al. to 9th Circuit Court of Appeals from District Court order entered June 18, 2003

United States Court of Appeals for the Ninth Circuit
Docket Number 03-55894
Metro-Goldwyn-Mayer, et al. v. Grokster Ltd. et al.

8/[illegible]/03	Filed UNDER SEAL Appellants Jerry Leiber, Mike Stoller, Peer International, Criterion Music, Famous Music Corporation opening brief
8/19/03	Filed UNDER SEAL Appellant Metro-Goldwyn-Mayer opening brief
9/17/03	Filed Appellee StreamCast Networks brief
9/17/03	Filed UNDER SEAL Appellee Grokster Ltd. brief
10/2/03	Filed UNDER SEAL Appellant Metro-Goldwyn-Mayer reply brief
10/3/03	Appellants Jerry Leiber, Mike Stoller, Peer International, Criterion Music, Famous Music Corporation reply brief
2/3/04	ARGUED and SUBMITTED TO Robert BOOCHEVER, John T. NOONAN, Sidney R. Thomas
8/19/04	FILED OPINION: AFFIRMED; FILED AND ENTERED JUDGMENT
9/10/04	MANDATE ISSUED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Jan. 24, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF DARRELL SMITH

I, Darrell Smith, hereby follows:

1. My name is Darrell Smith. I reside in Scottsdale, Arizona.

2. I am the Chief Technology Officer of MusicCity. I am the chief software developer at MusicCity for the software program called "Morpheus."

3. Before working with MusicCity, I was Vice President of Development at Motion Pixel, Inc. and Sirius Publishing, Inc., where I developed advanced video compression and playback software for use in the telecommunications, personal computers and motion picture industries.

4. The Morpheus software program is a communications tool that allows users to connect together to form a user network. Using the Morpheus software program, users may search for and share any kind of computer file (including text, images, audio, video, and software files) with any other user of the network. The network itself creates indexes of resources available to it, without relying upon a central server to index the entire network. The Morpheus software program

also has the ability to send and receive instant messages within the network, to organize media files on one's own computer, and to display or play the contents of media files on one's computer.

5. The network created by users of the Morpheus software program (and the programs of the other defendants) is "self-organizing," in that the users communicate with each other without assistance from MusicCity. The network itself shares and updates information, and allocates different resources as needed.

6. The user network consists of users of the Morpheus, KaZaA, or Grokster software products.

7. One particularly useful and innovative feature of the network created by users of the Morpheus software program is the "dynamic," or variable, use of "supernodes." A "node" is an end-point of the Internet, typically a user's computer. A "supernode" is a node that has a heightened function, accumulating information from multiple other nodes. In the network created by users of the Morpheus software program, nodes become supernodes and may revert to being mere nodes depending upon network demands and the nodes' ability, to take on heavier network duties. The network self-selects supernodes; a user's node may be a supernode one day and not on the following day, depending on resource needs and availability on the network.

8. Supernodes help the network operate efficiently by aggregating information from many nodes so that each node, by searching one supernode, needs to connect with fewer other nodes to find resources.

9. MusicCity does not operate any supernodes.

10. When a user installs the Morpheus software program, the program comes with an initial list of supernodes, just as a browser generally comes pre-loaded with a list of popular

web site addresses and Internet service providers. When the person's computer first connects to one of the supernodes, the supernode updates the initial list that came with the program.

11. When a user first operates the Morpheus software program, it interacts briefly with MusicCity's server to establish a username and password. MusicCity itself does not use the username or password for any purpose; instead, the username identifies the user uniquely to other members within the user network. If the software cannot access the MusicCity server, the user may still access the user-created network, but the user's username will not be properly displayed and other users will not know that this is the same user who has connected before. Indeed, this has happened many times when MusicCity's servers have been unavailable.

12. After attempting to submit the user's username (and even if MusicCity's server is unavailable), the Morpheus software program connects to the user-created network by connecting to another user who is functioning at that time as a supernode. To search the network, the Morpheus software program sends search requests to a supernode; the supernode reports results from the nodes and supernodes with which it communicates.

13. A user who wishes to locate a file on another user's computer enters a search term into a search request page. The software connects the user to a supernode, which searches other nodes connected to it and, if necessary, other supernodes. The local supernode then sends to the requester a list of other users on the network who have files that are associated with the search terms.

14. MusicCity has no involvement in making search requests, maintaining file indexes, processing search requests, compiling search results, sending search results to

a user, controlling searches or displays of results, or monitoring searches or displays of results.

15. Next, to obtain files, a user of the Morpheus software program selects files from the search results and connects directly to the other users' computers and downloads the files directly from the other users' computers. MusicCity's servers are not involved in identifying locations that host user files, requesting those files for transfer, communicating with the host users, transferring files from one user to another, controlling or monitoring transfers of user files, or controlling or monitoring management or use of files. MusicCity's servers have no knowledge of particular files being transferred among users.

16. MusicCity's involvement with use of the Morpheus software after delivery of the software is very limited. The software contains two components that activate the user's Microsoft Internet Explorer "browser" software when the software is running on a user's computer, regardless of any activity by the user. One component calls on MusicCity's servers to obtain changeable background graphics for the "start" page of the Morpheus user interface. The background graphics make the software user interface attractive, give MusicCity the chance to broadcast messages to Morpheus software users, and permit advertising. The other component calls on other servers of MusicCity or other companies, which send additional advertisements into a window at the bottom of the software's user interface.

17. Both the "start" page graphics and the advertisements are obtained by the user's Microsoft Internet Explorer program whenever the Morpheus software program is running and is connected to the user network, regardless of the activity of the user.

18. Thus, even if one engages in no searching, sharing, downloading, or playing of media files, the graphics and advertising will be displayed on the software interface.

19. Once a user has obtained the Morpheus software program, neither MusicCity nor any of its computer servers participates in, or contributes in any way to, the transfer of media files on the network created by users of the Morpheus software program.

20. As noted above, once the user obtains the Morpheus software program, MusicCity has no involvement in any of the steps for searching and the transfer of files. In addition, the Morpheus software program does not communicate to MusicCity or its servers any information about possession, receipt, transfer, searching, or indexing of the media files by the user. Nor does it use MusicCity or its servers to search for, index, transfer, download, manage, display or play any files of the Plaintiffs' media content.

21. To foster a sense of community among users of the Morpheus software program, MusicCity operates at its web site a chat service and a ' discussion board, but the Morpheus software has no direct connection to those I services. A user of the software may click on a link displayed in the "Start" page I graphical interface in order to go to MusicCity's web-based chat or discussion services, but the access to those services is through a web interface that exists regardless of whether one arrives from the Morpheus interface or directly from the web via its Internet address www.musiccity.com. Morpheus usernames and passwords do not gain access to the chat and discussion services; one must register a username and password separately for those services.

22. In sum, once a user has installed a copy of the Morpheus software program, MusicCity has no effective involvement with or control over what a user does with the program. Users must elect to run the software, determine

what (if any) files they wish to store on their hard drive or to share, decide what bandwidth to allocate to the application, and indicate whether they may be designated to serve as a transient supernode. Users decide whether to use the software to join and form a public, user-created network. Users decide whether to search for, find, send, or receive files over the user-created network. The Morpheus product does not report any information about a user's conduct to MusicCity's servers. It sends only username/password information when the user starts running Morpheus.

23, If MusicCity ceased to operate, if its servers became inoperative (as has happened on occasion owing to technical malfunctions or maintenance) or if all network connections to MusicCity are severed, the searching, indexing, transferring, downloading, managing, display and play functions of the software would continue unaffected.

24. The only changes would be that (1) the display of advertisements and the display of graphics on the software user interface would be interrupted, and (2) the user's username would be displayed on the user network without identifying the user as using the Morpheus software program.

25. MusicCity does not "operate" the Morpheus user network, and it does not operate a file-indexing service. Morpheus software program users can (and, in fact, do) take advantage of the program's full communication functionality without MusicCity's continuing involvement. Even when MusicCity's servers have been down, Morpheus use has been ongoing, with Morpheus users able to find and download fries on their own.

26. The Morpheus product is widely available from third parties on its user-created network or the Internet at large. MusicCity cannot reliably stop a particular person or computer from obtaining a copy o the Morpheus product.

27. A variety of related digital technologies, some of which may be used in conjunction with Morpheus, may equally be accused of being "essential tools" for copying files and other data regardless of the legal status of those files. They include:

a) high-speed communications devices such as DSL and cable modems, favored by those who want to download video or sound files;

b) browser software (such as Microsoft Internet Explorer or America Online's Netscape Communicator), for viewing, editing and copying files that are posted to the Web;

c) server software (such as Microsoft Internet Information Server and Apache HTTP Server) for distributing content across the Internet

d) media player software (such as Microsoft Media Player), for viewing and displaying media files;

e) e-mail and instant messaging software, favored by those who want to send or receive files privately;

f) internet relay chat servers, commonly used for file-sharing activities;

g) newsgroup software (often bundled into e-mail software), favored by those who want to choose and download music and video files from newsgroups;

h) file transfer protocol software for obtaining files over the Internet;

i) scanners, fax modems, and printers, for those who want to copy and/or transmit images over the Internet and otherwise; and

j) large-capacity storage devices such as hard drives, CD-ROM burners, DVD burners, and Zip drives, and

their recording media, favored by those who want to keep libraries of video or sound files.

28. Attached hereto as Exhibit A is a true and correct copy of a print-out of the screen displays of the Morpheus software program's "Start" interface.

29. Attached hereto as Exhibit B is a true and correct copy of a print-out of the screen display of the Morpheus software program's "Search" interface.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Scottsdale, Arizona on January 21, 2002.

/s/
Darrell Smith

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed July 12, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR COPYRIGHT INFRINGEMENT

Plaintiffs, through undersigned counsel, allege as follows based on personal knowledge as to allegations concerning themselves and on information and belief as to all other allegations:

NATURE OF THE ACTION

1. Plaintiffs, who are owners of copyrights in motion pictures and sound recordings, bring this action to stop Defendants from continuing to encourage, enable, and profit from the massive infringements of Plaintiffs' copyrighted works on the Internet. Dubbed the "next Napster" by the press, Defendants have developed and control networks largely dedicated to the repeated and exploitative unauthorized distribution and reproduction of Plaintiffs' protected works. Defendants provide Internet users with a fully integrated infrastructure that connects them to millions of infringing digital files. Defendants have created a 21st century piratical bazaar where the unlawful exchange of protected materials takes place across the vast expanses of the Internet, and where the materials being exchanged include first-run movies

currently playing in theaters and hit songs from virtually every major recording artist. The sheer magnitude of this haven for piracy is overwhelming and undeniable. Defendants themselves cannot disclaim knowledge of the massive infringements facilitated by their networks. Indeed, in an effort to create a protected zone for piracy, Defendants have encrypted the electronic communication within their networks and boast of the anonymity it provides to users. Furthermore, Defendants have conspired with each other and with third parties in committing the acts herein averred. The ease of use of Defendants' networks and the massive piracy they facilitate have rapidly advanced their popularity with potential users. Defendants have sought to turn their growing user base into profit through advertising and investment dollars. In short, Defendants are building a business based on the daily massive infringement that they enable and encourage. Defendants' conduct has caused and continues to cause Plaintiffs grave and irreparable harm.

JURISDICTION AND VENUE

2. This is an action for copyright infringement and arises under the Copyright Act, 17 U.S.C. § 101, *et seq.*, based on acts of copyright infringement committed in the United States. This Court has exclusive jurisdiction of this action under 28 U.S.C. § 1338(a).

3. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1400(a) because this is a judicial District in which a substantial part of the events giving rise to the claims occurred, and/or this is a judicial District in which Defendants reside or may be found.

THE PARTIES

4. Plaintiff Metro-Goldwyn-Mayer Studios Inc. is a Delaware corporation, with its principal place of business in California.

5. Plaintiff Columbia Pictures Industries, Inc. is a Delaware corporation, with its principal place of business in California.

6. Plaintiff Disney Enterprises, Inc. is a Delaware corporation, with its principal place of business in California.

7. Plaintiff New Line Cinema Corporation is a Delaware corporation that is qualified to transact business in California.

8. Plaintiff Paramount Pictures Corporation is a Delaware corporation, with its principal place of business in California.

9. Plaintiff Time Warner Entertainment Company, L.P. is a Delaware limited partnership that is qualified to transact business in California.

10. Plaintiff Twentieth Century Fox Film Corporation is a Delaware corporation, with its principal place of business in California.

11. Plaintiff Universal City Studios, Inc. is a Delaware corporation, with its principal place of business in California.

12. Plaintiffs Metro-Goldwyn-Mayer Studios Inc., Columbia Pictures Industries, Inc., Disney Enterprises, Inc., New Line Cinema Corporation, Paramount Pictures Corporation, Time Warner Entertainment Company, L.P., Twentieth Century Fox Film Corporation, and Universal City Studios, Inc., will be referred to collectively as the "Studio Plaintiffs."

13. The Studio Plaintiffs are U.S. motion picture studios or their affiliates that own the copyright, or exclusive reproduction, adaptation, and/or distribution rights under United States copyright, in certain motion pictures (including but not limited to those listed on Exhibit A), each of which is the subject of a valid Certificate of Copyright Registration from the Register of Copyrights or as to which an application

to register such picture under copyright is pending (the "Copyrighted Motion Pictures").

14. Plaintiff Arista Records, Inc. is a Delaware corporation that is qualified to transact business in California.

15. Plaintiff Atlantic Recording Corporation is a Delaware corporation that is qualified to transact business in California.

16. Plaintiff Atlantic Rhino Ventures Inc. d/b/a Rhino Entertainment Company is a Delaware corporation with its principal place of business in California.

17. Plaintiff Bad Boy Records is a joint venture of Arista Good Girls, Inc., a Delaware corporation with its principal place of business in New York, and Bad Boy Entertainment, a Delaware corporation with its principal place of business in New York, and is qualified to transact business in California.

18. Plaintiff Capitol Records, Inc. is a Delaware corporation that is qualified to transact business in California.

19. Plaintiff Elektra Entertainment Group Inc. is a Delaware corporation that is qualified to transact business in California.

20. Plaintiff Hollywood Records, Inc. is a California corporation with its principal place of business in California.

21. Plaintiff Interscope Records is a California general partnership with its principal place of business in California.

22. Plaintiff LaFace Records is a joint venture between Arista Ventures, Inc., a Delaware corporation, and LaFace Records, Inc., a Georgia corporation, and is qualified to transact business in California.

23. Plaintiff London-Sire Records Inc. is a Delaware corporation that is qualified to transact business in California.

24. Plaintiff Motown Record Company, L.P. is a California limited partnership that is qualified to transact business in California.

25. Plaintiff The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment, is a New York general partnership that is qualified to transact business in California.

26. Plaintiff Sony Music Entertainment Inc. is a Delaware corporation that is qualified to transact business in California.

27. Plaintiff UMG Recordings, Inc. is a Delaware corporation that is qualified to transact business in California.

28. Plaintiff Virgin Records America, Inc. is a California corporation with its place of business in California.

29. Plaintiff Walt Disney Records is a division of ABC, Inc., a New York corporation that is qualified to transact business in California.

30. Plaintiff Warner Bros. Records Inc. is a Delaware corporation with its principal place of business in California.

31. Plaintiff WEA International Inc. is a Delaware corporation that is qualified to transact business in California.

32. Plaintiff WEA Latina Inc. is a Delaware corporation that is qualified to transact business in California.

33. Plaintiff Zomba Recording Corporation is a New York corporation that is qualified to transact business in California.

34. Plaintiffs Arista Records, Inc., Atlantic Recording Corporation, Atlantic Rhino Ventures Inc. d/b/a Rhino Entertainment Company, Bad Boy Records, Capitol Records, Inc., Elektra Entertainment Group Inc., Hollywood Records, Inc., Interscope Records, LaFace Records, London-Sire Records Inc., Motown Record Company, L.P., The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment, Sony Music Entertainment Inc., UMG

Recordings, Inc., Virgin Records America, Inc., Walt Disney Records, Warner Bros. Records Inc., WEA International Inc., WEA Latina Inc., and Zomba Recording Corporation will be referred to collectively as the "Record Company Plaintiffs." The Studio Plaintiffs and the Record Company Plaintiffs will be referred to collectively as "Plaintiffs."

35. The Record Company Plaintiffs are the copyright owners or owners of exclusive rights under United States copyright with respect to certain copyrighted sound recordings embodied in their phonorecords, including but not limited to those listed on Exhibit B, each of which is the subject of a valid Certificate of Copyright Registration from the Register of Copyrights or as to which an application to register such sound recording under copyright is pending (the "Copyrighted Sound Recordings").

36. Defendant Grokster, Ltd. (hereinafter "Grokster") is a limited liability company with its principal place of business in Nevis, West Indies.

37. Defendant StreamCast Networks, Inc. f/k/a MusicCity.com, Inc. is a corporation organized and existing under the laws of the State of Oregon with its principal place of business in Franklin, Tennessee. Its affiliate, Defendant MusicCity Networks, Inc., is a corporation organized and existing under the laws of the State of California with a place of business in Woodland Hills, California. (Defendants StreamCast Networks, Inc., MusicCity.com, and MusicCity Networks, Inc. are collectively referred to herein as "MusicCity.")

38. Defendant Kazaa B.V., f/k/a Consumer Empowerment BV (hereinafter "Kazaa"), is a limited liability company organized under the laws of The Netherlands with its principal place of business in Amsterdam, The Netherlands.

39. Defendant Niklas Zennstrom (hereinafter "Zennstrom") is a resident of Sweden and a founder and Director of Defendant Kazaa. Defendant La Galiote BV (hereinafter "La Galiote") is an entity through which Zennstrom conducts business and a part owner of Kazaa.

40. Defendant Janus Friis Degnbol (hereinafter "Friis") is a resident of Denmark and a founder and Director of Defendant Kazaa. Defendant Indigo Investment BV (hereinafter "Indigo") is an entity through which Friis conducts business and a part owner of Kazaa.

41. Defendant Sharman Networks Limited (hereinafter "Sharman") is a company registered in Vanuatu and based in Australia. Defendant LEF Interactive Pty Ltd. (hereinafter "LEF"), which is based in Australia, is an alter ego of Sharman and/or an entity through which Sharman conducts business.

42. Each of the Defendants is, and at all times averred herein was, a party to the unlawful activities complained of herein, and has conspired with and/or acted in concert or combination with each of the other Defendants and/or has aided and abetted such other Defendants and/or has acted as an agent for each of the other Defendants with respect to the actions and matters described in this Complaint.

43. This Court has personal jurisdiction over Defendants because they reside in and/or are doing business in this State and District; they have intentionally engaged in acts targeted at this District that have caused harm in this District; they have purported to enter into agreements with residents of this State and District; and they have purposefully availed themselves of the privilege of conducting activities in this State and District. In addition, many of the wrongful acts complained of herein occurred in this State and District.

BACKGROUND ALLEGATIONS

44. The Internet is a worldwide network of millions of computers and computer networks that enables computer users to communicate with one another through the digital transmission of information from one computer to another. Recent years have seen the development and refinement of technologies for the reproduction and distribution via the Internet of various types of infringing digital files, including files containing motion pictures, music, and other content.

45. Defendants have created and control extensive and integrated networks that use the Internet to connect people throughout the world and encourage and enable them to pool various types of infringing digital files, including files containing motion pictures, music, and other content, into what is effectively a distributed database of millions of such files and to make available, transmit, and reproduce unlawful copies of those files. Defendants provide their users with the infrastructure, technological means, and support and services to accomplish these infringements. Defendants are involved in and enable this process in a way that assists and facilitates their users' infringements.

46. Defendants have provided to their users at no cost, via online download, proprietary application software that allows their users to connect to and use closed computer networks, controlled by Defendants, to reproduce and distribute infringing digital files. The primary technology to do so, which is called "FastTrack," was created by and/or under the direction of Defendants Kazaa, Zennstrom, La Galiote, Friis, and/or Indigo, which have offered the technology itself and also, at all relevant times, have licensed it to Defendants MusicCity, Grokster, Sharman, and LEF. Defendants Kazaa, Sharman, and LEF call their version "KaZaA Media Desktop." Defendant MusicCity termed its version "Morpheus." Defendant Grokster's version is called simply "Grokster." Although the versions of FastTrack differ in cosmetic ways,

they contain substantially identical code and employ the same protocols. Regardless of which version their users employed, the user was or is connected to the same network controlled by Defendants. Thus, the Defendants' respective user populations utilizing the FastTrack technology have had and have mutual visibility and access to each other's infringing digital files.

47. Each Defendant's FastTrack application software has enabled its users to connect their computers to one or more central computer servers controlled and maintained by that Defendant. After the central server registered, identified, and logged in the user, the user connected to a "supernode" – a powerful computer, with a high-bandwidth connection, operated by another user already connected to Defendants' network. Defendants Grokster and Kazaa have operated and controlled computers that function as supernodes. Defendants' central servers maintain communications with supernodes and assist in administering Defendants' FastTrack network.

48. After one of Defendants' FastTrack users connects to a supernode, that supernode compiles an index of digital files being offered by the user for downloading by others, and it processes search requests submitted by the user. The supernode does likewise for all other users that have been assigned to it. In response to a search request, the supernode reviews its own index of files and, if necessary, the indices maintained by other supernodes, and displays the search results to the user. Defendants have provided their users with sophisticated tools to search their networks to locate the copyrighted works they want. For example, when a user types in the title of one of the Studio Plaintiffs' motion pictures, the system displays a result list showing all currently available audiovisual files containing the title of the motion picture in their name and purporting to contain all or part of that motion picture. With simple commands, the user can download a file directly from the hard drive of a fellow user who hosts it.

49. Communications on Defendants' FastTrack networks between their user's computer and the Defendants' central servers, between the user and a supernode, between supernodes and the central servers, and between and among supernodes are all encrypted. Defendants created and control the means of encryption. The encryption ensures that Defendants' networks remain "closed" (*i.e.*, cannot be accessed without Defendants' permission and the use of Defendants' software) and thus under Defendants' control.

50. Defendant MusicCity's infringing system has not been limited to using FastTrack, however. At relevant times, MusicCity has employed different, but functionally equivalent, technologies to operate its infringing network. For example, MusicCity has operated its network using a technology known as "openNap," which is directly based on a reverse engineering of Napster's notorious infringing system. MusicCity has operated one of the largest such "openNap" networks in the world. MusicCity has also operated its network using other technologies. Regardless of the technology it has employed at any given time, however, MusicCity has continuously enabled, facilitated, and benefited from the massive infringement of Plaintiffs' works.

51. Similarly, the principals of Defendant Grokster have operated, through an entity known as Swaptor Ltd., a large infringing network based on openNap technology. Swaptor Ltd. has also been a licensee of the FastTrack technology and has assigned its rights under that license to Defendant Grokster. Grokster and Swaptor Ltd. were formed and are owned by the same principals, and there is a unity of interest between the two entities.

52. Defendants have provided their users with facilities, such as online chat rooms and message boards, in which their users – with Defendants' full knowledge – regularly make

clear that the primary use of Defendants' networks is the unlawful distribution and reproduction of copyrighted works.

53. Defendants have made their networks available throughout the United States and the world. At any given time, an enormous number of infringing digital files are available for downloading through the Defendants' networks. The overwhelming majority of the digital files are being distributed and reproduced in violation of the copyright law. The infringing digital files available on and through Defendants' networks include illegal copies of hit sound recordings as well as recently released motion pictures, including many that are still playing in theaters and are not yet legitimately available in any other media format.

54. Defendants are capable of controlling the activities of their users and the infringing digital files available through their networks. Defendants are also aware of the illegal nature of their users' activities, and actively participate in, facilitate, materially contribute to, and encourage those activities, and profit from those activities by, *inter alia*, drawing users to their networks and services, thereby attracting advertising revenues and otherwise adding value to Defendants' businesses.

55. After this action was filed, Defendants Kazaa, Zennstrom, Friis, La Galiote, and/or Indigo sold and transferred Kazaa's name, web site, and certain other assets to Defendants Sharman/LEF. Defendants Kazaa, Zennstrom, Friis, La Galiote and/or Indigo retained the rights to Kazaa's most important asset, the FastTrack technology that is the heart of Kazaa's infringing system. At the same time, as part of its agreement with Sharman/LEF, Defendants Kazaa, Zennstrom, Friis, La Galiote and/or Indigo licensed to Sharman the worldwide rights to the FastTrack technology in return for the payment of a continuing royalty to Kazaa and agreed not to issue new licenses of the FastTrack technology to others (the "License Agreement"). Under the License

Agreement, Sharman has the right, among other things, to maintain, modify, update, develop, and assign the FastTrack technology and any improvements it makes to that technology. Defendants Sharman/LEF currently operate and control the infringing network previously operated and controlled by Kazaa, Zennstrom, Friis, La Galiote and/or Indigo, and are the successors to Kazaa in the control, maintenance, and further modification and development of the underlying FastTrack system that is responsible for the massive infringement of Plaintiffs' copyrighted works by all the Defendants.

56. Defendants have engaged in a conspiracy, common enterprise, and common course of conduct, among themselves and third parties, through which they have, among other things, developed, maintained, and controlled the FastTrack technology; implemented uniform upgrades and updates of FastTrack; exploited each other's user base, and sold and transferred the rights to that technology among each other. The purpose of such conspiracy, common enterprise, and common course of conduct has been, among other things, to serve each of these Defendant's own economic benefit by knowingly, willfully, and intentionally infringing Plaintiffs' Copyrighted Motion Pictures and Copyrighted Sound Recordings and to attempt to escape liability to Plaintiffs. Each of these Defendants knowingly, willfully, and intentionally has committed the acts hereinabove described in furtherance of the conspiracy, common enterprise, and common course of conduct.

CLAIM FOR RELIEF

(By All Plaintiffs Against All Defendants, for Copyright Infringement Pursuant to 17 U.S.C. § 501, et seq.)

57. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 56 as if fully set forth herein.

58. A tremendous amount of copyright infringement takes place on and through Defendants' networks every day. These infringements occur, *inter alia*, whenever one of their users, without authorization of the copyright owner, uses Defendants' networks to download a copyrighted content file from another user's computer or makes copyrighted content files available for such unlawful downloading. Such acts constitute unauthorized reproduction and distribution and result in unauthorized copies. Defendants participate in, facilitate, materially contribute to, and encourage these infringements.

59. At all relevant times, Defendants have engaged and continue to engage in the business of knowingly and systematically participating in, facilitating, materially contributing to, and encouraging the above-described unauthorized reproductions and/or distributions of the Copyrighted Motion Pictures and Copyrighted Sound Recordings and thus the infringement of Plaintiffs' copyrights and exclusive rights under copyright in the Copyrighted Motion Pictures and Copyrighted Sound Recordings. Defendants have actual and constructive knowledge of the infringements committed on and through their network.

60. At all relevant times, Defendants have derived substantial financial benefit from the infringement of Plaintiffs' copyrights. Defendants display advertisements on their networks and charge fees for such advertising. The amount of those fees is directly related to the number of users, which depends directly on Defendants' having a wide range and selection of pirated motion pictures, sound recordings, and other works. The availability of such content attracts new users to Defendants' networks, which adds, in turn, to the inventory of pirated content. In addition, Defendants are undertaking a purposeful strategy to make their networks and their respective businesses more attractive to existing and

potential investors and advertisers by increasing the number of their users and the volume of unauthorized copyrighted motion pictures and sound recordings available for unlawful reproduction and distribution.

61. At all relevant times, Defendants have had the right and ability to supervise and/or control the infringing conduct of their users.

62. Defendants, through (a) their active participation in the unauthorized reproduction and/or digital distribution of unauthorized copies of Plaintiffs' copyrighted works, (b) their provision of the means and facilities for unauthorized reproduction and distribution, (c) their encouragement of their users to engage in these unauthorized acts and their material contribution to their users' acts, (d) their control over the means and facilities by which such unauthorized reproductions and distributions are effected, and (e) the substantial, direct financial benefits that Defendants derive from all of the aforesaid acts, all with full knowledge of their illegal consequences, are committing, and/or are contributorily and vicariously liable for, a vast number of copyright infringements, including infringements of the Copyrighted Motion Pictures and Copyrighted Sound Recordings.

63. The infringement of each Plaintiff's rights in and to each of the Copyrighted Motion Pictures and Copyrighted Sound Recordings constitutes a separate and distinct act of infringement.

64. The foregoing acts of infringement by Defendants have been willful, intentional, and purposeful, in disregard of and with indifference to Plaintiffs' rights.

65. As a direct and proximate result of Defendants' infringement of Plaintiffs' copyrights and exclusive rights under copyright, Plaintiffs are entitled to damages as well as

Defendants' profits pursuant to 17 U.S.C. § 504(b) for each infringement.

66. Alternatively, Plaintiffs are entitled to the maximum statutory damages, pursuant to 17 U.S.C. § 504(c), in the amount of $150,000 for all individual infringements involved in the action with respect to any one work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c).

67. Plaintiffs further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

68. Defendants' conduct threatens to cause, and is causing, and unless enjoined and restrained by this Court will continue to cause, Plaintiffs great and irreparable injury that cannot fully be compensated for or measured in money. Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, Plaintiffs are entitled to preliminary and permanent injunctions prohibiting further infringements of their copyrights and exclusive rights under copyright.

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. For Defendants' profits and for damages in such amount as may be found, or alternatively, for maximum statutory damages of not less than $150,000 for all individual copyright infringements involved in the action with respect to any one work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c).

2. For a preliminary and a permanent injunction enjoining Defendants and Defendants' agents, servants, employees, officers, attorneys, successors, licensees, partners, and assigns, and all persons acting in concert or participation with each or

any of them, from: (a) directly or indirectly infringing in any manner any of Plaintiffs' respective copyrights or other exclusive rights (whether now in existence or hereafter created), including without limitation, copyrights or exclusive rights under copyright in the Copyrighted Motion Pictures listed on Exhibit A and the Copyrighted Sound Recordings listed on Exhibit B, and (b) causing, contributing to, enabling, facilitating, or participating in the infringement of any of Plaintiffs' respective copyrights or other exclusive rights (whether now in existence or hereafter created), including without limitation, copyrights or exclusive rights under copyright in the Copyrighted Motion Pictures listed on Exhibit A and the Copyrighted Sound Recordings listed on Exhibit B.

3. For prejudgment interest according to law.

4. For Plaintiffs' attorneys' fees, costs, and disbursements in this action.

5. For such other and further relief as the Court may deem just and proper.

Dated: June 13, 2002

By /s/
David E. Kendall

EXHIBIT A

Copyrighted Motion Pictures

COLUMBIA PICTURES INDUSTRIES, INC.	FINAL FANTASY	PA1-043-426
COLUMBIA PICTURES INDUSTRIES, INC.	KNIGHT'S TALE, A	PA1-036-163
DISNEY ENTERPRISES, INC.	PRINCESS DIARIES, THE	APPLICATION
METRO-GOLDWYN-MAYER STUDIOS INC.	JEEPERS CREEPERS	PA1-033-409
METRO-GOLDWYN-MAYER STUDIOS INC.	HANNIBAL	PA 940-970
METRO-GOLDWYN-MAYER STUDIOS INC.	LEGALLY BLONDE	PA1-041-139
NEW LINE CINEMA CORPORATION	RUSH HOUR	PA 911-012
PARAMOUNT PICTURES CORPORATION	RAT RACE, THE	APPLICATION
PARAMOUNT PICTURES CORPORATION	TOMB RAIDER	APPLICATION
PARAMOUNT PICTURES CORPORATION	TRUMAN SHOW, THE	PA 799-052
TIME WARNER ENTERTAINMENT CO., L.P.	EXIT WOUNDS	PA1-029-060
TWENTIETH CENTURY FOX FILM CORPORATION	MOULIN ROUGE	PA1-033-100
TWENTIETH CENTURY FOX FILM CORPORATION	PLANET OF THE APES	PA1-039-744
UNIVERSAL CITY STUDIOS, INC.	AMERCIAN PIE 2	APPLICATION

EXHIBIT B
COPYRIGHTED SOUND RECORDINGS

Arista Records, Inc.	Sarah McLachlan	Adia	Surfacing	243-027
Atlantic Recording Corporation	Uncle Kracker	Follow Me	Double Wide	284-346
Atlantic Recording Corporation	Sugar Ray	Every Morning	14:59	262-149
Bad Boy Records	112	Only You	112	233-376
Bad Boy Records	Faith Evans	Never Gonna Let You Go	Keep the Faith	228-350
Capitol Records, Inc.	Keith Urban	Where The Blacktop Ends	Keith Urban	273-265
Capitol Records, Inc.	Cyndi Thompson	What I Really Meant to Say	My World	pending
Elektra Entertainment Group Inc.	Tracy Chapman	Fast Car	Tracy Chapman	92-491
Interscope Records	Smash Mouth	Walking on the Sun	Fush Yu Mang	238-756
Sony Music Entertainment Inc.	Jennifer Lopez	I'm Real	J. Lo	pending
Sony Music Entertainment Inc.	Incubus	Drive	Make Yourself	278-818
Sony Music Entertainment Inc.	Lil Bow Wow	Ghetto Girls	Beware of Dog	pending
Sony Music Entertainment Inc.	Michael Jackson	You Rock My World	Invincible	pending

The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment	**Eve 6**	**Here's To the Night**	**Horrorscope**	**285-024**
The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment	**Dave Matthews Band**	**The Space Between**	**Everyday**	**pending**
UMG Recordings, Inc.	**Nelly**	**Ride Wit Me**	**Country Grammar**	**281-782**
UMG Recordings, Inc.	**Lee Ann Womack**	**Whey They Call It Falling**	**I Hope You Dance**	**281-198**
Virgin Records America, Inc.	**Mariah Carey f/ Cameo**	**Loverboy**	**Glitter**	**pending**
Virgin Records America, Inc	**Blur**	**There's No Other Way**	**Leisure**	**135-033**
Virgin Records America, Inc	**Janet Jackson**	**Someone To Call My Lover**	**All For You**	**pending**
Warner Bros. Recording Inc.	**Goo Goo Dolls**	**Naked**	**A Boy Named Goo**	**193-623**
Zomba Recording Corporation	**Britney Spears**	**Sometimes**	**Baby One More Time**	**260-870**
Zomba Recording Corporation	**N'Sync**	**Pop**	**Celebrity**	**pending**
Zomba Recording Corporation	**R Kelly**	**Fiesta**	**Tp-2.com**	**289-462**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JERRY LEIBER, et al., Plaintiffs, v. KAZAA BV, et al., Defendants. [Filed July 21, 2002]	Case No. CV 01 09923 SVW (PJWx) (Consolidated with CV 01 08541 SVW (PJWx))

PLAINTIFFS' FIRST AMENDED [PROPOSED] LEIBER CLASS ACTION COMPLAINT FOR COPYRIGHT INFRINGEMENT

Plaintiffs Jerry Leiber individually and d/b/a Jerry Leiber Music, Mike Stoller individually and d/b/a Mike Stoller Music, Peer International Corporation, Songs of Peer, Ltd., Peer Music, Ltd., Criterion Music Corporation, Famous Music Corporation, Bruin Music Company, Ensign Music Corporation, and Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music (collectively, "plaintiffs") on behalf of themselves and all music publishers represented by The Harry Fox Agency, Inc. ("HFA") that own and/or control at least one musical composition that has been made available through defendants' respective services defined below (the "Class"), by their attorneys Paul Weiss, Rifkin, Wharton & Garrison and Davis Wright Tremaine LLP, allege upon knowledge as to themselves and upon information and belief as to all other matters, as follows:

NATURE OF ACTION

1. This is a class action for contributory and vicarious copyright infringement, pursuant to 28 U.S.C. §§ 1331 and 1338(a) and (b), on behalf of all music publishers represented

by HFA that own and/or control at least one copyrighted musical composition that has been made available without their permission through the services owned and operated by defendants Consumer Empowerment BV a/k/a FastTrack, MusicCity Networks, Inc., MusicCity.com, Inc., and Grokster, Ltd., and located at <www.kazaa.com> ("KaZaA service"), <www.musiccity.com> ("MusicCity service"), and <www.grokster.com> ("Grokster service").

2. Plaintiffs are songwriters and music publishers that own and/or control copyrights in some of the most recognizable musical compositions recorded in the Twentieth Century, including "These Boots Are Made For Walking" by Lee Hazlewood, "Moon River" by Henry Mancini and Johnny Mercer, and "Jailhouse Rock" by Jerry Leiber and Mike Stoller. Plaintiffs bring this action for preliminary and permanent injunctive relief and damages to halt the pervasive and willful infringement of their copyrighted musical works.

3. Defendants are facilitating, materially contributing to, and encouraging wholesale infringement of the world's most popular songs - mostly owned by plaintiffs and other Class members - by brashly operating a Napster "copycat" service. Indeed, upon information and belief, defendants' services were created and offered by defendants specifically to siphon users of the infamous Napster "peer-to-peer" music service who, in the wake of federal court rulings ordering Napster to remove infringing content, are seeking a new haven for music piracy.

4. Defendants are fully aware of the massive scale of infringements taking place on their services. The musical compositions reproduced and distributed without authorization over the services include virtually every well-known musical composition ever written and recorded. Defendants' purpose is simple: by offering plaintiffs' and Class members' songs for free, they hope to attract some or

all of Napster's 40 million or more users, in open defiance of the law. By offering their commercial services, defendants have generated advertising revenue and hope to obtain venture capital funding and subscription fees. By this action, plaintiffs seek to redress this massive and willful infringement that seriously threatens the livelihoods of songwriters and their music publishers.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and I338(a) and (b).

6. This Court has venue under 28 U.S.C. §§ 1391(b) and (c) and 1400(a).

7. This Court has personal jurisdiction over defendants because defendants reside in and/or are doing business in the State of California and in this District. Additionally, many of the acts of infringement complained of herein resulted from defendants' actions in the State of California and in this District. Defendants have further purposefully engaged in acts targeted at this District that have caused harm in this District; they have purported to enter into agreements with residents of this State and District; and they have availed themselves of the privilege of conducting activities in this State and District.

BACKGROUND

A. The Parties

8. Plaintiffs Jerry Leiber individually and d/b/a Jerry Leiber Music and Mike Stoller individually and d/b/a Mike Stoller Music ("Leiber & Stoller") are citizens of California and are professional songwriters who are also engaged in the business of music publishing whereby they license the recording, reproduction, and distribution of musical works for which they either own or control the copyrights. Leiber

& Stoller are composers of such famous songs as "Stand By Me," "Love Potion # 9," "On Broadway," "Yakety Yak," "Kansas City," "Poison Ivy," and "Hound Dog." Several of these songs were recently featured in the Broadway show "Smokey Joe's Cafe."

9. Plaintiff Peer International Corporation ("PIC") is a New Jersey corporation, with its principal place of business in New York, New York, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

10. Plaintiff Songs of Peer, Ltd. is a Delaware corporation, with its principal place of business in New York, New York, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

11. Plaintiff Peer Music, Ltd. is a New York corporation, with its principal place of business in New York, New York, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

12. Plaintiff Criterion Music Corporation ("Criterion") is a California corporation, with its principal place of business in Hollywood, California, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

13. Plaintiff Famous Music Corporation ("Famous") is a Delaware corporation, with its principal place of business in Los Angeles, California, and is actively engaged in the business of music publishing whereby it licenses the

recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

14. Plaintiff Bruin Music Company is a Delaware corporation, with its principal place of business in Los Angeles, California, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights,

15. Plaintiff Ensign Music Corporation is a Delaware corporation, with its principal place of business in Los Angeles, California, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

16. Plaintiff Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music is a California corporation, with its principal place of business in Encino, California, and is actively engaged in the business of music publishing whereby it licenses the recording, reproduction, and distribution of musical works for which it either owns or controls the copyrights.

17. Defendant Consumer Empowerment BV a/k/a FastTrack ("Consumer Empowerment") is a limited liability company organized under the laws of The Netherlands, with its principal place of business in Amsterdam, The Netherlands.

18. Defendant MusicCity.com, Ine. is a corporation organized and existing under the laws of the State of Oregon, with its principal place of business in Franklin, Tennessee. Its affiliate, MusicCity Networks, Inc., is a corporation organized and existing under the laws of the State of California, with its principal place of business in Woodland Hills, California. (Defendants MusicCity.com, Inc. and

MusicCity Networks, Inc. are collectively referred to herein as "MusicCity.")

19. Defendant Grokster, Ltd. ("Grokster") is a limited liability company organized under the laws of the West Indies, with its principal place of business in Nevis, West Indies.

20. Each of the defendants is and has been party to the unlawful activities complained of herein and/or acted in concert or combination with each of the other named defendants and/or has aided and abetted such other defendants and/or has acted as an agent for each of the other defendants with respect to the actions and matters described in this Complaint.

B. Songwriters and Music Publishers

21. Plaintiffs are professional songwriters and music publishers. Songwriters earn their livelihood, in part, by licensing their exclusive rights to make and distribute sound recordings embodying their musical compositions in the form of CDs, cassette tapes, LPs, and digital downloads. Music publishers are the caretakers of the songwriters' musical compositions. Thus, a record label or Internet music service that wants to distribute a recording of Leiber & Stoller's "Hound Dog" on CD, cassette tape, or as a digital download, must first obtain a license from and pay royalties to Leiber & Stoller, the music publishers and copyright owners.

22. Like thousands of other music publishers, plaintiffs have agency relationships with HFA. HFA is an industry service organization representing over 27,000 music publisher-principals that collectively own or control more than 2.5 million copyrighted musical works. Established in 1927, HFA serves as agent on behalf of its publisher-principals in licensing copyrighted musical compositions for reproduction and distribution as physical phonorecords (CDs,

cassette tapes, and phonograph records), and over the Internet as digital phonorecord deliveries. HFA is a wholly owned subsidiary of the National Music Publishers' Association ("NMPA"). Founded in 1917, NMPA is the principal trade association of music publishers in the United States. By appointing HFA as their common licensing and collection agent, plaintiffs and other Class members have confirmed their interest in generating royalties by licensing their copyrighted musical works.

C. The Copyrighted Musical Compositions

23. Plaintiffs Leiber & Stoller own and/or control the copyrights in the musical compositions "Jailhouse Rock," written and composed by Jerry Leiber and Mike Stoller, for which the Register of Copyrights has duly issued Registration Certificates Nos. Eu 477666 and Ep 112-749, and Renewal Registration Certificates Nos. RE 234-406 and RE 234-387; "Love Potion #9," written and composed by Jerry Leiber and Mike Stoller, for which the Register of Copyrights has duly issued Registration Certificates Nos. Eu 582-484 and Ep 134-716, and Renewal Registration Certificates Nos. RE 338-201 and RE 338-204; "Yakety Yak," written and composed by Jerry Leiber and Mike Stoller, for which the Register of Copyrights has duly issued Registration. Certificates Nos. Eu 523-626 and Ep 120-208, and Renewal Registration Certificates Nos. RE 282-599 and RE 282-181; "Poison Ivy," written and composed by Jerry Leiber and Mike Stoller, for which the Register of Copyrights has duly issued Registration Certificates Nos. Eu 590-492 and Ep 133-842, and Renewal Registration Certificates Nos. RE 327-437 and RE 338-200; and "Stand By Me," co-written and composed by Jerry Leiber and Mike Stoller, for which the Register of Copyrights has duly issued Registration Certificates Nos. Eu 683-281, Eu 667-764, and

Ep 156-127, and Renewal Registration Certificates Nos. RE 430-902, RE 430-835, and RE 430-905.

24. Plaintiff PIC owns and/or controls the copyrights in the musical compositions "Besame Mucho," written and composed by Consuelo Velasquez, for which the Register of Copyrights has duly issued Registration Certificate No. E 65106 and Renewal Registration No. RE 436-261; "Granada," written and composed by Agustin Lara, for which the Register of Copyrights has duly issued Registration Certificate No. EP 88100 and Renewal Registration No. R 248637; "Blue Moon of Kentucky," written and composed by Bill Monroe, for which the Register of Copyrights has duly issued Registration Certificate No. EP 16363 and Renewal Registration No. R 583185; "Walk Like an Egyptian," written and composed by Liam Sternberg, for which the Register of Copyrights has duly issued Registration Certificate No. PA 278-841; and "Preciosa," written and composed by Rafael Hernandez, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 156-635 and Renewal Registration No. RE 625-775.

25. Plaintiff Peer Music, Ltd. owns and/or controls the copyright in the musical composition "Afuera," written and composed by Alfonso Hernandez Estrada (a/k/a Saul Hernandez), for which the Register of Copyrights has duly issued Registration Certificate No. PA 721-019.

26. Plaintiff Songs of Peer, Ltd. owns and/or controls the copyright in the musical composition "Long Neck Bottle," written and composed by Rick Carnies, for which the Register of Copyrights has duly issued Registration Certificate No. PA 822-250.

27. Plaintiff Criterion owns and/or controls the copyrights in the musical compositions "The End," written

and composed by Jimmy Krondes and Sid Jacobson, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 526-983 and Renewal Registration No. 293-583; "These Boots Are Made For Walking," written and composed by Lee Hazlewood, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 915-461 and Renewal Registration No. RE 612-396; "Pearly Shells," written and composed by John Kalapana and Leon Paber, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 733-766 and Renewal Registration No. 471-068; "I Can Love You Like That," written and composed by Jennifer Kimball, Steve Diamond, and Mary Beth Derry, for which the Register of Copyrights has duly issued Registration Certificate No. PA 754-016; and "Standing Outside The Fire," written and composed by Garth Brooks and Jenny Yates, for which the Register of Copyrights has duly issued Registration Certificate No. PA 877-473.

28. Plaintiff Famous owns and/or controls the copyrights in the musical compositions "A Time For Us (Romeo and Juliet Love Theme)," written and composed by Larry Kusik, Eddie Snyder, and Nino Rota, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 66733 and Renewal Registration No. RE 722-651; "Theme From Cheers (Where Everybody Knows Your Name)," written and composed by Gary Portnoy and Judy Hart Angelo, for which the Register of Copyrights has duly issued Registration Certificate No. PA 161-190; "I Don't Want To Wait," written and composed by Paula Cole, for which the Register of Copyrights has duly issued Registration Certificate No. PA 823-612, and "Moon River," written and composed by Henry Mancini and Johnny Mercer, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 656-109 and Renewal Registration No. RE 423-686.

29. Plaintiff Bruin Music Company owns and/or controls the copyright in the musical composition "Mission Impossible - Theme," written and composed by Lalo Schifrin, for which the Register of Copyrights has duly issued Registration Certificate No. Eu 974-446 and Renewal Registration No. RE 662-987.

30. Plaintiff Ensign Music Corporation owns and/or controls the copyright in the musical composition "I Hope You Dance," written and composed by Tia Sillers and Mark D. Sanders, for which the Register of Copyrights has duly issued Registration Certificate No. PA 981-302.

31. Plaintiff Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music, owns and/or controls the copyrights in the musical compositions "Two Hearts," written and composed by Lamont Dozier and Phil Collins, for which the Register of Copyrights has duly issued Registration Certificate No. PA 417-757; and "Invisible," written and composed by Lamont Dozier, for which the Register of Copyrights has duly issued Registration Certificate No. PA 239-393.

THE INFRINGING SERVICES

32. The Internet is a worldwide network of millions of computers and computer networks. With the click of a mouse, a user can locate virtually every conceivable form of entertainment in just seconds. The Internet has created new opportunities for songwriters to let their music be heard around the world as never before. Songwriters and their music publishers have licensed their copyrighted musical works to Internet music companies to take full advantage of these opportunities.

33. Unfortunately, in addition to creating opportunities for new and creative models for legitimate businesses, the Internet also has afforded unprecedented opportunities for piracy. The most notorious example of this is Napster's

former peer-to-peer "file-sharing" service. At its height, the Napster service enabled more than 40 million users worldwide to upload and download hundreds of thousands of copyrighted musical compositions at the staggering rate of over 2 billion files per month. The Napster service was found to be promoting music piracy on an unprecedented scale and is now the subject of a preliminary injunction. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *aff'g in part and rev'g in part*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *on remand, Leiber v. Napster, Inc.*, Nos. C 00-0074 MHP, MDL C00-1369 MHP, 2001 WL 789461 (N.D. Cal. Mar. 5, 2001), *aff'd, A&M Records, Inc. et al. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

34. Defendants provide users with an enhanced peer-to-peer service for infringing copyrighted musical compositions. Like Napster, defendants provide their respective users with the infrastructure, facilities, technological means, and ongoing support and services to infringe copyrighted musical compositions. Defendants participate in, facilitate, materially contribute to, and encourage these infringements from start to finish. Their services are extensive, highly-integrated closed systems that anonymously connect users and encourage and enable them to pool their previously private music files into what is effectively a massive database of millions of such files so that they can all make free copies. To shield this pirate's haven, defendants have made their services anonymous and have employed encryption technology.

35. Defendants provide their users, at no cost, via on-line download, three versions of proprietary application software that allow their users to connect to and use a closed computer network, controlled by defendants, to locate, reproduce, and distribute infringing digital files. Although the three services differ in cosmetic ways, they are based

upon the software program known as "FastTrack" and employ the same business model.

A. The Infringing KaZaA Service

36. According to press articles, Consumer Empowerment is "a self-described 'virtual organization'" of programmers from Sweden, Denmark, and The Netherlands. It created a proprietary software program called "FastTrack," which enables peer-to-peer reproduction and distribution of copyrighted musical compositions.

37. On or about July 28, 2000, Consumer Empowerment publicly launched its infringing service by releasing the FastTrack software program on its website, <www.kazaa.com>, with the name "KaZaA" ("KaZaA software"). On this website, Consumer Empowerment makes the following claim: "KaZaA is a media community, where millions [of] community members can share their media files – audio, video, images and documents – with each other. You can search for and download media files with any of our three products - KaZaA.com (this web site), KaZaA Media Desktop and the new KaZaA Winamp Plug-in."

38. KaZaA.com is a web search engine employing the KaZaA software to search the " KaZaA community" for media files. It permits users to find, among other things, audio and video files and download them directly to their individual computers. Consumer Empowerment claims that, "[w]here traditional search engines search the World Wide Web, KaZaA searches thousands of computers at once, all connected through the file-sharing network of KaZaA."

39. Users designate the files they wish to share with other KaZaA service users through KaZaA Media Desktop, which specifies folders on the users' hard drives that the software program recognizes. All files in the shared folders

are accessible by any other KaZaA service user. When a user shares files on the KaZaA service, they "make them instantly available to an audience who are [*sic*] specifically looking to download 'media' files."

40. KaZaA Winamp Plug-in permits users to find audio files among other users in the "KaZaA community" and play them directly on their individual computers. According to Consumer Empowerment, a user "can search for music by artist, title, album or keywords, and play or enqueue [*sic*] the tracks directly in Winamp."

41. The KaZaA software interacts seamlessly with Consumer Empowerment's "server side" software, maintained on Consumer Empowerment's computer servers, thus enabling KaZaA service users to connect their computers to one or more central computer servers controlled and maintained by Consumer Empowerment.

42. After the central server registers, identifies, and logs-in the user, the KaZaA service connects the user to a "SuperNode" or "Content SuperNode." According to the KaZaA service, "[a] *Content SuperNode* is a special version of KaZaA that is specifically designed for one purpose: sharing a large number of files on the KaZaA community. A *Content SuperNode* can be run by anyone who wants to distribute large volumes of 'media' content on KaZaA." Specifically, a SuperNode is a powerful computer with a high-bandwidth connection that is operated by another user already connected to the KaZaA service. After a user connects to a SuperNode, these "local search hubs" compile an index of digital files being offered by the user on his/her computer hard disk drives for downloading by other KaZaA service users. The KaZaA software also enables users to search for and import pre-existing libraries of music files – such as libraries that users built using Napster – to make them available through the KaZaA service. The SuperNode

performs a similar function for all other users that have been connected to it by the KaZaA service. In response to a search request, the SuperNode reviews its own index of files and, if necessary, the indices maintained by other SuperNodes. It then displays the search results to the user, thereby permitting the user to download any and all files displayed by that search.

43. Any KaZaA service user can become a SuperNode by affirmatively choosing that option in the KaZaA software. The KaZaA service encourages its users to become SuperNodes because "it does not cost anything to distribute content on KaZaA with a *Content SuperNode*" and such distribution "can server approximately 500.000 (yes, half a million!) files!" Consumer Empowerment's central servers maintain communications with all SuperNodes and assist in administering the entire KaZaA service.

44. The KaZaA service continuously monitors its thousands of users to keep track of when they log on and off. As soon as a user logs on, that user's music files are inventoried and added to the distributed database. As soon as a user logs off, that user's files are eliminated from the database. Thus, the KaZaA service continually updates its database thousands of times each day.

45. Consumer Empowerment provides its users with sophisticated tools to search the network to locate the copyrighted musical works they want. Users can search by song title and/or recording artist. For example, when a user types in the title of one of plaintiffs' musical compositions, the KaZaA software displays a search result list showing all currently available audiovisual files containing the title of the musical composition in their name and purporting to contain all or part of that musical composition. With simple commands, the user can download a file directly from the hard drive of a fellow user.

46. Digital music files come in varying levels of audio quality and also can be expected to download at widely varying speeds – depending, among other things, on the type of Internet connection maintained by the KaZaA service user posting the song. Consumer Empowerment provides its users with information about the sound quality and connection speed of available files and allows users to specify these parameters when formulating their searches. This enables users to tailor their searches to locate only those songs that are of a selected audio quality and/or that can be downloaded at the desired speed. Thus, a user could search the distributed database for Leiber & Stoller's "Jailhouse Rock" at a specified audio quality level and download speed.

47. Consumer Empowerment does more than simply tell users what songs are available and which users have them; it creates the connection between the user who has selected a music file for copying and the user who is offering the selected file. Thus, all users need to do is select the file they want and it automatically downloads - *i.e.*, copies and saves - to their individual computer hard drive. Consumer Empowerment makes the entire transaction possible. Consumer Empowerment also assists users in circumventing "firewalls," which are maintained by computer networks to prevent the importation of unknown, unlawful, or suspect data into the network.

48. Communications on the KaZaA service between its users' computers and its central servers, between the user and a SuperNode, between SuperNodes and the central servers, and between and among SuperNodes are all encrypted. Consumer Empowerment created and controls the means of encryption. The encryption ensures that the KaZaA service remains "closed" (*i.e.*, cannot be accessed without permission from Consumer Empowerment and the use of its proprietary

software program) and thus that the service is under Consumer Empowerment's control.

49. To further facilitate their users' activities, Consumer Empowerment provides them with a host of other features and services, including a bulletin board "forum" that permits users to exchange information about the location of infringing files to enable them to locate songs better and an on-line "chat" area where users can talk in real time. However, a user need not take advantage of all or any of these features in order to copy and distribute copyrighted music over the KaZaA service.

50. Each time a recording of a musical composition is downloaded using the KaZaA software, the user making the recording available engages in an unauthorized distribution of that composition and the user who downloads it makes an unauthorized copy. That copy is then available for further uploading and downloading – known as a "viral" distribution – by other KaZaA service users. At any given time, millions of files are available for downloading through the KaZaA service.

51. The copyrights to the overwhelming majority of songs available through the KaZaA service belong to plaintiffs and other Class members. Consumer Empowerment knowingly and systematically participates in, facilitates, and materially contributes to the infringement of those musical works.

52. Consumer Empowerment has derived a significant financial benefit from the infringement by users of its service of Class members' copyrights, which Consumer Empowerment at all relevant times has had the right and ability to supervise and control.

B. The Infringing MusicCity Service

53. Consumer Empowerment licensed its FastTrack software program to MusicCity to enable MusicCity to establish a substantially identical infringing service.

54. On or about April 21, 2001, MusicCity publicly launched its infringing service by releasing the software on its website, <www.musiccity.com>, under the name "Morpheus." On this website, MusicCity makes the following claim: "You can use Morpheus to find and download all kinds of media files – Audio, Video, Images, Documents and more. We have included an integrated media library – My Media - that automatically organizes your media files, a Theater where you can enjoy your media files, and a Playlist so you can create your own custom playlists. . . . MusicCity is a media community; it means that you can share all types of media files with other MusicCity members."

55. The MusicCity service operates in a manner indistinguishable from the KaZaA service. The software program, Morpheus, essentially employs the same peer-to-peer technology found in the KaZaA software. Like the KaZaA software, Morpheus searches the "MusicCity community" for media files. It permits users to find, among other things, audio and video files, and to download them directly to their individual computers. MusicCity, like Consumer Empowerment, also explains on the MusicCity service website that, "[w]here traditional search engines search the World Wide Web, Morpheus searches thousands of computers at once, all connected through [the] MusicCity network of users."

56. Users designate the files they wish to share with other MusicCity service users through My Media, which specifies folders on the users' hard drives that the software program recognizes. All files in the shared folders are accessible by any other MusicCity service user.

57. Morpheus interacts seamlessly with MusicCity's "server side" software, maintained on MusicCity's computer servers, thus enabling MusicCity service users to connect their computers to one or more central computer servers controlled and maintained by it. After the central server registers, identifies, and logs-in the user, the MusicCity service connects the user to a "Content SuperNode," which functions similarly to the KaZaA service's SuperNodes and enables users to perform a wide variety of search queries and ultimately to download media files.

58. Like the KaZaA service, the MusicCity service does more than simply tell users what songs are available and which users have them; it creates the connection between the user who has selected a music file for copying and the user who is offering the selected file. Thus, all users need to do is select the file they want and it automatically downloads – *i.e.*, copies and saves – to their individual computer hard drive. The MusicCity service makes the entire transaction possible. MusicCity also assists users in circumventing "firewalls," which are maintained by computer networks to prevent the importation of unknown, unlawful, or suspect data into the network.

59. Communications on the MusicCity service between its users' computers and its central servers, between the user and a Content SuperNode, between Content SuperNodes and the central servers, and between and among Content SuperNodes are all encrypted. MusicCity created and controls the means of encryption. The encryption ensures that the MusicCity service remains "closed" (*i.e.*, cannot be accessed without permission from MusicCity and the use of its proprietary software program) and thus that the service is under MusicCity's control.

60. Like Consumer Empowerment, MusicCity further facilitates its users' activities by prov ding them with a host

of other features and services, including a discussion "forum" that permits users to exchange information about the location of infringing files to enable them to locate songs better and an on-line "chat" area where users can talk in real time. However, a user need not take advantage of all or any of these features in order to copy and distribute copyrighted music over the MusicCity service.

61. Each time a recording of a musical composition is downloaded using Morpheus, the user making the recording available engages in an unauthorized distribution of that composition and the user who downloads it makes an unauthorized copy. That copy is then available for further uploading and downloading – known as a "viral" distribution – by other MusicCity service users. At any given time, millions of files are available for downloading through MusicCity.

62. The copyrights to the overwhelming majority of songs available through the MusicCity service belong to plaintiffs and other Class members. MusicCity knowingly and systematically participates in, facilitates, and materially contributes to the infringement of those musical works.

63. MusicCity has derived a significant financial benefit from infringement by users of its service of Class members' copyrights, which MusicCity at all relevant times has had the right and ability to supervise and control.

C. The Infringing Grokster Service

64. Consumer Empowerment also licensed its FastTrack software program to Grokster to enable Grokster to establish a substantially identical infringing service.

65. On or about August 2, 2001, Grokster publicly launched its infringing service by releasing the software on its website, <www.grokster.com>, with the name "Grokster"

("Grokster software"). On this website, Grokster makes the following claim: "You can use Grokster is find and download all kinds of media files - *Audio, Video, Images, Documents and Software*. We have included an integrated media library - *My Grokster*-- that automatically organizes all your media files, a *Theatre* where you can enjoy your media files, and *Playlist* so you can create your own custom playlists. . . . Grokster is a so called media community; it means you can share your media files with other Grokster members."

66. The Grokster service operates in a manner indistinguishable from both the services of Consumer Empowerment and MusicCity. The Grokster software essentially employs the same peer-to-peer technology found in the KaZaA software and Morpheus. Like the KaZaA software and Morpheus, the Grokster software searches the "Grokster community" for media files. It permits users to find, among other things, audio and video files, and to download them directly to their individual computers. Like both Consumer Empowerment and MusicCity, Grokster also explains on the Grokster service website that, "[w]here traditional search engines search the World Wide Web, Grokster searches thousands of computers at once, all connected through the file-sharing network of Grokster."

67. Users designate the files they wish to share with other Grokster service users through My Grokster, which specifies folders on the users' hard drives that the software program recognizes. All files in the shared folders are accessible by any other Grokster service user.

68. The Grokster software interacts seamlessly with Grokster's "server side" software, maintained on Grokster's computer servers, thus enabling Grokster service users to connect their computers to one or more central computer servers controlled and maintained by it. After the central server registers, identifies, and logs in the user, the user is

connected to a "SuperNode," which functions similarly to the KaZaA service's SuperNodes and the MusicCity service's Content SuperNodes and enables users to perform a wide variety of search queries and ultimately to download media files.

69. Like both the KaZaA and MusicCity services, the Grokster service does more than simply tell users what songs are available and which users have them; it creates the connection between the user who has selected a music file for copying and the user who is offering the selected file. Thus, all users need to do is select the file they want and it automatically downloads - *i.e.*, copies and saves - to their individual computer hard drive. The Grokster service makes the entire transaction possible. Grokster also assists users in circumventing "firewalls," which are maintained by computer networks to prevent the importation of unknown, unlawful, or suspect data into the network.

70. Communications on the Grokster service between its users' computers and its central servers, between the user and a SuperNode, between SuperNodes and the central servers, and between and among SuperNodes are all encrypted. Grokster created and controls the means of encryption. The encryption ensures that the Grokster service remains "closed" (*i.e.*, cannot be accessed without permission from Grokster and the use of its proprietary software program) and thus that the service is under Grokster's control.

71. Like both Consumer Empowerment and MusicCity, Grokster further facilitates its users' activities by providing them with a host of other features and services, including a bulletin board "forum" that permits users to exchange information about the location of infringing files to enable them to locate songs better and an on-line "chat" area where users can talk in real time. However, a user need not take

advantage of all or any of these features in order to copy and distribute copyrighted music over the Grokster service.

72. Each time a recording of a musical composition is downloaded using the Grokster software, the user making the recording available engages in an unauthorized distribution of that composition and the user who downloads it makes an unauthorized copy. That copy is then, available for further uploading and downloading - known as a "viral" distribution - by other Grokster service users. At any given time, millions of files are available for downloading through the Grokster service.

73. The copyrights to the overwhelming majority of songs available through the Grokster service belong to plaintiffs and other Class members. Grokster knowingly and systematically participates in, facilitates, and materially contributes to the infringement of those musical works.

74. Grokster has derived a significant financial benefit from infringement by users of its service of Class members' copyrights, which Grokster at all relevant times has had the right and ability to supervise and control.

DEFENDANTS' RESPONSIBILITY FOR THE RAMPANT INFRINGEMENTS ON THEIR SERVICES

75. Each of the defendants has full knowledge of the infringements occurring on their respective services. Indeed, defendants created their services for specific purpose of building commercial businesses by exploiting Class members' copyrighted musical compositions. Specifically, in the agreements between defendants and their respective users (which appears on their respective services' websites), each defendant acknowledges, in identical language, that "UNAUTHORISED COPYING, DISTRIBUTION, MODIFICATION, PUBLIC DISPLAY, OR PUBLIC PERFORMANCE OF COPYRIGHTED WORKS IS AN

INFRINGEMENT OF THE COPYRIGHT HOLDERS' RIGHTS." Yet, defendants purport to reject unilaterally any responsibility, stating, again in identical language, that users are "PUT ON NOTICE THAT YOU ARE ENTIRELY RESPONSIBLE FOR YOUR CONTENT AND FOR ENSURING THAT IT COMPORTS WITH ALL APPLICABLE LAWS, INCLUDING ALL COPYRIGHT AND DATA-PROTECTION LAWS"

76. Nonetheless, the bulletin board forums maintained by each of the infringing services on their websites make extensive reference to the infringing conduct taking place on their respective services by their users. Consumer Empowerment admits on the KaZaA service website that it is fully aware of its users' communications by acknowledging that "some of the files other KaZaA users designate to share may have been created or distributed without the copyright owners' authorisation" and further induces the unauthorized distribution and reproduction of copyrighted works by encouraging its users to "[t]ell a friend about KaZaA" because "the more people who use[ ] it, the better it gets!" Indeed, on another webpage, Consumer Empowerment states that its "best advice is to take advantage of these networks [the MusicCity and KaZaA services] while they're free and help proliferate the growth of the [peer-to-peer] community." Likewise, Grokster admits on its service's website that it is fully aware of its users' communications by acknowledging that "some of the files other Grokster users designate to share may have been created or distributed without the copyright owners' authorisation." Like Consumer Empowerment, both Grokster and MusicCity further induce the unauthorized distribution and reproduction of copyrighted works by encouraging their users on their respective services' websites to "[t]ell a friend about Grokster" and "Invite -A-Friend" to the "MusicCity community" because "the more people who use it, the better it gets!"

77. Defendants at all relevant times have had the right and ability to supervise and control the infringing activities of their users. For example, in the agreements between defendants and their respective users, defendants, in identical language, "reserve the right to unilaterally terminate the account" of any user of their respective services who infringes a copyright holders' rights.

78. Defendants have derived substantial financial benefit from the infringement of Class members' copyrighted musical works. Defendants draw users to their services by offering them free and unfettered access to Class members' copyrighted musical works, thereby attracting commercial advertising revenues and investors. Defendants display extensive paid advertising on their network and charge fees for such advertising. The amount of those fees is directly related to the number of each service's users, which depends directly on defendants having a wide range and selection of pirated musical compositions. The availability of such content attracts new users and further increases the library of infringing content available-thus further enhancing the lure of defendants' services for investors and advertisers, as well as even more infringing users.

79. Specifically, among the companies that have chosen to advertise on the KaZaA service is half.com at <www.halfcom>, which markets video games. The MusicCity service displays advertisements from, among other companies, DirecTV-DSL at <www.directvdsl.com>, Multi Technology Equipment LLC at <www.mteweb.com>, and Iomegadirect at <www.iomega.com>. The Grokster service displays advertisements on behalf of, among other companies, The Mayan at <www.mayancasino.com> and Jiveplayer at <www.jiveplayer.com>.

80. Each of defendants, individually and acting in concert, have engaged and continue to engage in the business

of knowingly and systematically participating in, facilitating, materially contributing to, and encouraging the above-described unauthorized reproductions and/or distributions of copyrighted musical works owned or controlled by plaintiffs (including but not limited to the musical works named above) and other Class members, and thus the infringement of plaintiffs' and Class members' copyrights in their respective copyrighted musical works.

HARM TO THE MARKET FOR CLASS MEMBERS' COPYRIGHTED MUSICAL WORKS

81. Defendants' wholesale infringement harms the market for licensed recordings of Class members' copyrighted musical compositions. That market is the bread and butter of songwriters and their music publishers. Songwriters and music publishers do not earn royalties when a user on the KaZaA, MusicCity, or Grokster services downloads for free the same songs that have been licensed to others for reproduction and distribution as physical phonorecords and digital phonorecord deliveries. Defendants have made their services available throughout the United States and the world. At any given time, an enormous number of infringing digital files are available for downloading through the defendants' services. Indeed, on their services' websites, *Consumer Empowerment claims to have been responsible for 16 million downloads sour, and MusicCity claims over 1 million downloads per week.* According to a recent report by the U.S. research firm Webnoize, a combined total of 1.81 billions files were downloaded using the defendants' services in October 2001 alone. The overwhelming majority of the digital files are being distributed and reproduced in violation of copyright law. Unless defendants' pervasive infringement of Mass members' copyrighted compositions is halted, songwriters

and their music publishers will be substantially and irreparably harmed.

CLASS ACTION ALLEGATIONS

82. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2)&(3) on behalf of the Class (as defined above).

83. The members of the Class are so numerous that joinder of all members is impracticable. HFA represents more than 27,000 music publishers that own and/or control more than 2.5 million copyrighted musical works. Hundreds of thousands of Class members' songs are being made available through defendants' services at any given time.

84. Plaintiffs' claims are typical of the claims of the Class because the copyrights owned or controlled by plaintiffs and other Class members are being infringed in the same way and are causing substantially the same injury and because Class members seek the same relief as plaintiffs seek here.

85. Plaintiffs will adequately protect the interests of the Class. Plaintiffs are prominent songwriters and music publishers with catalogs that include some of the most recognizable musical works recorded in the Twentieth Century. Plaintiffs have retained counsel who are experienced and competent in class action copyright infringement litigation. Plaintiffs have no interests that are in conflict with these of the Class.

86. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

87. Because of the uniformity of defendants' practices, an award of injunctive relief would be applicable to every member of the Class.

88. Common questions of law and fact predominate over questions that affect only individual members. Questions or law and fact common to the Class, without limitation, include:

(a) the manner in which defendants' services make copyrighted musical works available for unauthorized distribution and copying;

(b) whether defendants have knowledge that infringing activity is taking place their respective services;

(c) whether defendants are capable of controlling the infringing activity on their respective services;

(d) whether defendants derive a financial benefit from the infringing activity taking place on their respective services; and

(e) whether defendants' conduct is willful.

89. Plaintiffs intend to request that this Court direct to the members of the Class the best notice practicable under the circumstances, pursuant to Federal Rule of Civil Procedure 23(c)(2).

FIRST CAUSE OF ACTION
(Contributory Copyright Infringement)

90. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 89.

91. As described above, defendants provide the infrastructure and facilities for the copyright infringements that takes place on, and by virtue of, their respective services on a massive scale every day. An infringement occurs each and every time one of their millions of users, without authorization of the copyright owner, uploads the title of a copyrighted music file to the indexed databases, thus offering it for distribution, and each time a user downloads another

user's music file from that person's computer into his/her own computer, resulting in an unauthorized copy. Each and every one of these infringements is facilitated., encouraged, and made possible by defendants.

92. Through their conduct averred herein, defendants have engaged and continue to engage in the business of knowingly and systematically inducing, causing, and materially contributing to, and participating in the above-described unauthorized reproductions and/or distributions of copyrighted musical works.

93. The infringement of each copyrighted musical work constitutes a separate and distinct act of infringement.

94. The foregoing acts of infringement by defendants have been willful, intentional, and purposeful, in disregard of, and in indifference to the rights of Class members.

95. Defendants' conduct, as averred herein, constitutes contributory infringement of Class members' copyrights in violation of Sections 106, 115, and 501 of the Copyright Act, 17 U.S.C. §§ 106, 115, and 501.

96. As a direct and proximate result of the contributory infringements by defendants of Class members' copyrights and exclusive rights under copyright, Class members are entitled to damages and defendants' profits pursuant to 17 U.S.C.§ 504(b) for each separate infringement.

97. Alternatively, Class members are entitled to statutory damages, pursuant to 17 U.S.C. § 504(c), in the amount of $150,000 with respect to each work infringed, or such other amounts as may be proper under 17 U.S.C. § 504(c). Class members further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

98. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Class

members great and irreparable injury that cannot fully be compensated or measured in money damages. Class members have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, Class members seek preliminary and permanent injunctive relief prohibiting further contributory infringement of their copyrights by defendants.

SECOND CAUSE OF ACTION
(Vicarious Copyright Infringement)

99. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 98.

100. At all times relevant herein, defendants had the right and ability to supervise anchor control their respective systems and the infringing conduct of their users by, without limitation, preventing or terminating a user's access to the services' computer servers and/or by refusing to index and provide connections to infringing music files and to prevent copying and distribution of those music files, but have failed to do so. As a direct and proximate result of such failure, the users are infringing plaintiffs' copyrighted musical compositions.

101. At all tunes relevant herein, defendants derived substantial financial benefit from infringement of Class members' copyrighted musical compositions. Virtually the entire value of these infringing services is based on the availability of unauthorized content. Class members' copyrighted songs serve as the principal attraction to the services. Defendants are further undertaking a purposeful strategy by means of the conduct alleged herein to generate future revenue and to enhance the value of their businesses by making their services more attractive to potential investors, advertisers, business partners, and others.

102. Defendants' acts of infringement have been willful, intentional, and purposeful, in disregard of, and in indifference to the rights of Class members.

103. Defendants' conduct constitutes vicarious infringement of Class members' copyrights and exclusive rights under copyright, in violation of Sections 106, 115, and 501 of the Copyright Act, 17 U.S.C. §§ 106, 115, and 501.

104. As a direct and proximate result of defendants' vicarious infringement of Class members' copyrights, Class members are entitled to damages and defendants' profits pursuant to 17 U.S.C. § 504(b) for each separate infringement.

105. Alternatively, Class members are entitled to statutory damages in the

it amount of $150,000 with respect to each work infringed, or far such other amounts as may be proper under 17 U.S.C. § 504(c).

106. Class members further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

107. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Class members great and irreparable injury that cannot fully be compensated or measured in money damages. Class members have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, Class members seek preliminary and permanent injunctive relief prohibiting further vicarious infringements of their copyrights by defendants.

WHEREFORE, plaintiffs and other Class members pray for judgment against defendants as follows:

1. For damages in such amount as may be established at trial; alternatively, for statutory damages in the amount of

not less than $150,000 with respect to each copyrighted musical work infringed, or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c).

2. For a preliminary and a permanent injunction prohibiting defendants and their respective agents, servants, employees, officers, attorneys, successors, licensees and assigns, and all persons acting in concert or participation with each or any of them, from: (i) directly or indirectly infringing in any manner any of Class members' copyrights (whether now in existence or hereafter created), and (ii) causing, contributing to, enabling, facilitating, or participating in the infringement of any of Class members' respective copyrights.

3. For prejudgment interest according to law.

4. For plaintiffs' attorneys' fees, costs, and disbursements it this action.

5. For such other and further relief as the Court may deem just and proper.

DATED: May 24, 2002

By: /s/

Kelli L. Sager

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF SEAN L. MAYERS

I, Sean L. Mayers, hereby declare:

1. My name is Sean L. Mayers. I reside in Toronto, Canada. I have knowledge of the facts set forth herein, and if called to testify as a witness thereto could do so competently under oath.

2. I am the co-founder and the Chief Executive Officer of J!VE Media Technologies, Inc. ("J!VE Media"), a company incorporated in 2000 under the laws of the Province of Ontario, Canada, and having its registered office in Toronto, Ontario, Canada.

3. I hold a Masters in Business Administration from Queen's University, Kingston. Ontario, Canada, and Certification in Competitive Marketing Strategy from Wharton Business School in Philadelphia, Pennsylvania.

4. Before joining J!VE Media, I was the Business Development Manger for Hotline Communications, Ltd., a company that focused on file-sharing software applications. Before that, I was the Regional Marketing, Media and Sales Manger of Ticketmaster in Canada. I have over ten years of

business experience in the internet entertainment industry, during the last four years of which I have specialized in business opportunities in the peer to peer and distributed computing communities of the internet.

5. J!VE Media is the creator of a suite of digital video packaging, digital rights management, and media delivery services, which enable content providers to distribute their video content via file-sharing on open, decentralized peer-to-peer networks and instant messaging communities. We specialize in three types of services: first, safeguarding and customizing digital packaging of clients' video content; second, distribution of enhanced video content using the file sharing software of our Syndicated Distribution Network Partners; and third, tracking of our clients' enhanced video content.

6. J!VE Media distributes full length music videos and television and movie segments on behalf of content providers. J!VE Media Files are created to be freely and legally downloaded and shared between Internet consumers through peer-to-peer networks, file-sharing applications, or via e-mail links. J!VE Media enters into agreements with content providers to encode, encrypt, and package their video content, and to then deploy or "seed" the content throughout our Syndicated Distribution Network, which includes peer-to-peer companies like Grokster. J!VE Media Files, in addition to playing video content, allows content providers to incorporate web links, video commercials, promotions, e-commerce, and other revenue generating opportunities.

7. J!VE Media, in connection with Syndicated Distribution Network Partners, such as Grokster, allows consumers to maintain access to free content, allows advertisers to reach peer-to-peer audiences, and allows entertainment companies to generate profits, while protecting the intellectual property rights of the video content owners.

8. J!VE Media charges content providers a fee that includes services such as encoding, packaging, graphic design, distribution, and reporting. In addition, J!VE Media earns money through the delivery of targeted advertising.

9. J!VE Media relies on the file sharing software of the members of our Syndicated Distribution Network to distribute content provided by our clients. J!VE Media's Syndicated Distribution Network Partners include LimeWire, Grokster, Music City, and other peer-to-peer technology leaders. By using the file sharing software of its Syndicated Distribution Network Partners to distribute content, J!VE Media is able to distribute our client's content to the millions of computers that currently use peer-to-peer file-sharing networks.

10. J!VE Media's clients are content providers who are willing to have their J!VE Media protected content distributed by users of peer-to-peer file-sharing software, including the millions of users of the Morpheus, KaZaA and Grokster applications.

11. Existing open, decentralized peer-to-peer file-sharing networks, when combined with the services offered by J!VE Media, offer content owners distinct business advantages over alternate online distribution technologies. Streaming and centralized downloads, represent the two most common forms of online distribution used by content owners today. Each has distinct drawbacks.

12. Distribution via streaming usually involves repeated access to content by consumers, which in turn results in network congestion, degraded content quality and high bandwidth costs for content providers.

13. Similarly, offering downloads from controlled websites entails considerable bandwidth data storage, and

maintenance costs, as the burden of providing these resources falls entirely on the content provider.

14. By utilizing existing peer-to-peer file-sharing networks, in contrast, content owners are able to rely almost entirely on users to provide the most costly computing resources involved in digital distribution: data storage and bandwidth. J!VE Media's technology, meanwhile, provides the elements of security and control that content owners desire.

15. The flagship product of J!VE Media is the J!VE Player Portable Media File format. This product allows J!VE Media to individually package music videos, television, and movie segments provided by content providers, with commercial sponsorship and advertising.

16. J!VE Player Portable Media Files are unique in several respects. First, they are designed to be downloaded by consumers, played, and shared. The files are compressed to make them attractive to consumers and to facilitate sharing between internet consumers of peer-to-peer networks, instant-messaging communities, or via an email link.

17. Second, digital rights management in the files protect our clients' valuable video content. J!VE Media also tracks the distribution of our digitally wrapped content and reports on content distribution and promotional penetration to our clients.

18. Third, J!VE Player Portable Media files allow content providers to incorporate weblinks to e-commerce sites and can embed commercials that dynamically change, depending on the content being viewed by the consumer.

19. Finally, since J!VE Media distributes only authorized content, J!VE Player Portable Media files provide consumers with the experience of watching very high-quality, first-generation video content.

20. A variety of content owners have recognized and embraced the opportunities presented by combining open, decentralized peer-to-peer file-sharing networks with J!VE Media's technology. J!VE Media has concluded agreements:

(a) With the Priority Records division of the EMI Recorded Music Group to package and distribute the promotional music video track "My Baby" by the well-known musical artist Lil' Romeo. J!VE Media seeded the Gnutella/LimeWire peer-to-peer network with the enhanced video file. The file then spontaneously spread to the FastTrack users' network (at the time comprised of users of the Morpheus, KaZaA and Grokster software). This promotion was extremely successful. By November 2001, over 400,000 unique downloads had been recorded, of which 60% took place on open, decentralized peer-to-peer networks;

(b) With Koch International, the world's third-largest independent music label, providing access to Koch artists' Pop, Rock, and Hip-Hop music videos;

(c) With CHUMCity Interactive, the media arm of Canada's CHUM television, which owns the 24 hour music channel MuchMusic, to package and distribute several of its proprietary television programs, including the Movie Television and Fashion Television channels;

(d) With The Comedy Network, Canada's 24 hour comedy cable channel, for television content;

(e) With Icebox Animation, the creators of the popular animated hits "Zombie College," "Mr. Wong" and "Starship Regulars" to package and distribute selected works; and

(f) With bThere.tv, a New York-based multimedia production studio that produces reality-based, celebrity entertainment video programming.

21. J!VE Media is also currently exploring promotional and distribution opportunities with contacts from several major motion picture studios and large United States' and European music labels.

22. J!VE Media's business depends upon peer-to-peer file sharing networks, including the networks formed by the community of users that employ the software distributed by the defendants in this case.

23. J!VE Media does not monitor online piracy.

24. I have personally searched for J!VE Player Portable Media Files on the FastTrack based peer-to-peer network, including using Grokster, and have found J!VE Player Portable Media Files that we have distributed with the approval and at the request of the copyright owners. While I have also noticed that some of the files currently available on peer-to-peer networks appear to have the titles of copyrighted music and movies, I have done no investigation as to whether such files are actually copyrighted works.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Toronto, Canada on September 6, 2002.

/s/
Sean L. Mayers

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF DANIEL B. RUNG IN SUPPORT OF GROKSTER, LTD.'S MOTION FOR SUMMARY JUDGMENT

I, Daniel B. Rung, declare as follows:

1. I am the founder of Grokster, Ltd. (Grokster"). I submit this declaration in support of Grokster's Motion for Summary Judgment. Unless otherwise indicated, the facts stated herein are of my own personal knowledge, and if called upon I can and will testify truthfully thereto in court.

2. Grokster is a three-person company. I handle the business side of the company. My son Matthew handles all of the technical aspects part-time while attending college. My brother Michael provides accounting services. Grokster has no paid employees.

3. Grokster distributes, for free, the Grokster software application. The application was licensed to Grokster by Consumer Empowerment BV (now known as Kazaa BV). Consumer Empowerment provides Grokster with only the machine-readable object code for the application, which Grokster then distributes. Grokster does not have access to, and has never had access to, the source code for the application, and cannot make any modifications or changes

to the application. Grokster's contract with Consumer Empowerment does not give Grokster the right to access the Grokster source code, and Consumer Empowerment has refused to allow Grokster access to that source code.

4. Grokster's sole control over the function or appearance of the Grokster software consists of our control over the content of the "start page" and the content of advertising. The Grokster application, when launched, downloads from Grokster's servers an HTML page containing content and graphics provided by us. When in operation, the Grokster application periodically requests advertising content from servers operated by either Grokster or our advertising partners, which is downloaded to the application and displayed in designated locations.

5. Other than the content of the start page and advertising, Grokster has absolutely no control over the operation of the Grokster application. Specifically, the filesharing functions of the Grokster application operate without any involvement by, or communication with, Grokster or any computer operated by Grokster. The filesharing component of Grokster consists of the FastTrack software licensed by Consumer Empowerment, and is functionally identical to the filesharing software contained in the Kazaa and other FastTrack products (although I understand that the current version of Kazaa contains additional functionality that has not been provided to Grokster).

6. When a user of any version of FastTrack (whether Grokster, Kazaa, or iMesh) issues a search request for a file, that search request is transmitted via the user's internet connection to other users of the FastTrack software. If those other users' indices of files contain a match for the search term, the location of the matching file is returned to the initial user, and the user can then initiate a transfer. If no match is

found, the search request is forwarded on to other users, until a match is found or the search fails. At no time in the filesharing process is any information whatsoever transmitted to Grokster or any computer under Grokster's control. the entire filesharing process is literally and completely invisible to Grokster. If Grokster were to cease all operations today, the filesharing functions of the Grokster software would not be altered or effected in any way.

7. The initial version of the FastTrack software licensed to Grokster required Grokster to operate a registration server. When a user first used the Grokster application, he or she was required to enter a user name and email address. That information was transmitted to Grokster's registration server, which checked to make sure that the user name was unique, and stored the information. With each subsequent use of the software, the user name was transmitted to Grokster's registration server, which checked the user name against the user database. If the user name was not valid (i.e., did not appear in the database, either because it was new or had been removed or blocked), certain functions such as instant messaging would not work. Other functions, however, including filesharing, would continue to function if the Grokster registration server was unavailable.

8. Beginning with Version 1.5, Consumer Empowerment modified the FastTrack software to no longer require a central registration database. Although Consumer Empowerment did not advise Grokster for the reason for this change, I believe that Consumer Empowerment was able to solve the problem of "disambiguating" user names without the need for a central server. In a communications system of any type (for example an email or telephone system) it is necessary for each user to have a unique address; if two different users each have the same name or phone number, the system will not know to whom a message or call should

be directed. Consumer Empowerment appears to have solved this problem; each user is free to choose his or her own user name, regardless whether that name is already in use by another. I do not know how this is accomplished, but by observation know that it was accomplished, as there is no longer a central registration server, but instant messaging nonetheless works.

9. Grokster was not involved in any way in the decision to eliminate the registration database. In fact, we would not have made that change if it were up to us, as the registration database provided us with a ready-made mailing list for our newsletters, as discussed below. Since the elimination of the central registration server, we have encouraged users to register for our newsletter by providing us with their email addresses, but that process is now voluntary and optional, and only a minority of Grokster users do so.

10. Since its inception, Grokster has been at the forefront in promoting the use of peer-to-peer filesharing for the authorized dissemination of creative works by independent music and video artists. Grokster promotes those artists and their works in a variety of ways. Grokster has entered into partnerships with several organizations representing thousands of individual artists who desire to share their work via peer-to-peer filesharing. For example, GigAmerica represents thousands of independent musical groups. In partnership with GigAmerica, the Grokster start page each week prominently features biographies of GigAmerica artists who actively encourage the free sharing of their works, and provides downloads of those works. In some instances (such as the current offerings from Lava/Atlantic Records artists A Simple Plan and Grade 8), those works include current releases by major labels who are plaintiffs in this action. Similarly, Grokster has partnered with both ReelMind and

Jive!Player, in order to offer authorized free downloads of independent video and film works of independent artists.

11. In addition to the Grokster start page, Grokster regularly distributes an electronic newsletter to tens of thousands of its users. A sample of these newsletters is attached hereto as Exhibit A. These newsletters each feature a selection of independent artists who have authorized distribution of their work via Grokster.

12. Beginning in March of this year, Grokster began receiving hundreds of individual emails from a company named MediaForce, each alleging that an individual user of the Grokster software was infringing the copyrights of their motion picture clients. In response to those notifications, Grokster set up an automated process in order to retrieve the users' email addresses from our database and transmit a notice to those users. We also advised MediaForce that we were instituting this system, and worked with them to agree on a format for future notifications that would make the process more efficient. We further advised MediaForce of Grokster's repeat offender policy (which was modeled after the repeat offender provisions of the Digital Millenium Copyright Act), and asked that, in the event they identified any repeat infringers (i.e., any user who, forty-eight hours after receipt of the first notification, was still sharing the allegedly infringing file), we would terminate that user's registration. In order to process such repeat offender notifications, we asked MediaForce to identify those notifications by including the phrase "REPEAT OFFENDER" in the subject line of each notification. MediaForce responded that it would use that procedure for any notification of repeat offenders. As of the date of this declaration, however, MediaForce has never identified a single repeat offender to Grokster. Copies of a sample

notification, and the correspondence between Grokster and MediaForce, are attached hereto as Exhibit B.

13. Shortly after Grokster set up the automated notification system described above, MediaForce without explanation ceased sending any notices to Grokster. Months later, MediaForce resumed sending notifications on a sporadic basis. Those notifications have been handled in the same manner.

14. Grokster has also received notifications of alleged infringements from the RIAA and the MPAA. Those notifications have been in machine-readable formats that, with some programming effort by us, can be utilized for notifications to individual users. In each instance, Grokster has forwarded the relevant allegations to all users for whom Grokster has email addresses. Neither the MPAA not the RIAA has ever notified Grokster of any alleged violation of Grokster's repeat infringer policy.

15. Grokster has also received notices of allegedly infringing conduct from the Harry Fox Agency. Unlike the notifications received from others, however, the Harry Fox notifications have been in the form of scores of individual text files, each containing information regarding a single user. As a result, the notifications cannot be processed automatically, but must be dealt with manually. Grokster requested that Harry Fox provide the data in a usable format, and offered to set up an automated program similar to the one we implemented for MediaForce. Harry Fox refused to do so. Nonetheless, we have processed all of the Harry Fox notifications by hand. Grokster has acted upon every notification received from any of the plaintiffs in this action, to the full extend of its ability to do so. We have done so notwithstanding the fact that dealing with these notices is a considerable burden to a two-person company.

16. Grokster, like many other interact companies, provides its users with online forums in which they may discuss technical aspects of the software, trade tips on the use of the product, and the like. Grokster also allows users to address technical support questions to Grokster's support personnel. I personally "moderate" each of these forums, reviewing potential postings before they appear on the website. I also personally respond to support questions. The forums and the technical support email each receive many thousands of individual messages, each of which I must review, so my review is by necessity cursory: in many instances, I can discern the nature of the question by simply reviewing the subject line and where appropriate inserting a pre-written response to a technical question. It is my policy to delete any content that violates Grokster's Terms of Service, including obscene or offensive postings. I also delete as inappropriate any message seeking advice on or discussing the copying of unauthorized copyrighted content: this includes any reference to any music or film title I recognize and do not know to be authorized.

17. Plaintiffs' counsel identified to me at my deposition several instances where I failed to identify such content, primarily because the subject line of the message provided sufficient information to identify the correct technical response without reading the entire message. I estimate, however, that I have blocked and deleted many hundreds of forum postings because they discussed or sought advice on conduct which appeared to violate the copyrights of others.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of September at Las Vegas, Nevada.

/s/
Daniel B. Rung

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF DARRELL SMITH IN SUPPORT OF DEFENDANT MUSICCITY.COM, INC.'S (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC.'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I, Darrell Smith, hereby declare:

1. My name is Darrell Smith. I reside in Scottsdale, Arizona.

2. I am the Chief Technology Officer of StreamCast Networks (hereinafter "StreamCast"). I am the chief software developer at StreamCast for the software program called "Morpheus."

3. Before working with StreamCast, I was Vice President of Development at Motion Pixel, Inc. and Sirius Publishing, Inc., where I developed advanced video compression and playback software for use in the telecommunications, personal computers and motion picture industries.

4. I began working with StreamCast in April, 2000. Since November, 2000, I have lead the technical development of the Morpheus software program (hereinafter

"Morpheus"). The design concept for the Morpheus software product is to create a network communication tool which performs several functions within a single user interface on a computer screen, or "graphical user interface" (abbreviated as "GUI"—pronounced "gooey"). Currently, a computer user must run several independent programs to perform common communications tasks; an email program for sending and receiving emails, an Internet browser for navigating the Internet, and a separate word processor for creating and editing documents.

5. Since November, 2002, the goal of the Morpheus design team has been to combine these popular computer tools into a single GUI which changes, or "morphs", depending on which particular application the user is selecting. Users of future versions of Morpheus will be able, for instance, to browse the internet to reserve a flight to visit a family member, send an email to a family member with the flight information, and calculate a budget for the trip on a spreadsheet, all within the same Morpheus GUI. Rather than using three separate programs, the user will be able to change the Morpheus interface itself to adapt to the user's needs for each particular task. When the user tells Morpheus she needs an Internet browser, for instance, the Morpheus interface will make available tools and a display to enable the user to navigation the Internet. It is this changing, or "morphing" from application to application—all within a single user interface—that inspired the name "Morpheus".

6. The current version of Morpheus, version 2.0, was released on August 16, 2002. The peer-to-peer functionality of Morpheus 2.0 is based on the Open Source Gnutella application known as "Jtella." The peer-to-peer functionality of the two prior versions of Morpheus, "Morpheus Preview Edition" (released March 1, 2002) and "Morpheus 1.9" (released June 10, 2002) were based on the Open Source

Gnutella application known as "Gnucleus." Because all three versions of Morpheus are Gnutella-based, the peer-to-peer functions of the software are almost identical in all relevant aspects. I therefore shall refer to Morpheus 2.0 herein, except where the Gnutella versions of the Morpheus program differ in relevant aspects.

7. Morpheus 2.0 performs a number of simple, popular computer functions, including a peer-to-peer communications tool, an Internet browser, and a file management tool. A true and correct copy of the application's peer-to-peer "Search" page from Morpheus 2.0 is attached hereto as exhibit "1". A true and correct copy of the application's "Home" page is attached hereto as Exhibit "2". A true and correct copy of the application's "Shop" page is attached hereto as Exhibit "3". A true and correct copy of the application's Internet browser "Web" page is attached hereto as Exhibit "4." A true and correct copy of the application's media organizer "Media" page is attached hereto as Exhibit "5."

8. Morpheus 2.0 also operates with a number of applications created by third parties, including an Internet chat/instant messaging tool by PalTalk, an e-commerce wallet tool from iBill, and a shopping application by Wurld Media. None of these programs are related to the peer-to-peer functionality of Morpheus 2.0.

9. After a user downloads and installs Morpheus 2.0 on her computer, she can use Morpheus 2.0 to browse the Internet as well as operate on the Gnutella peer to peer network within the same user "window," or graphical user interface.

10. Morpheus Preview Edition, 1.9, and 2.0 differ from certain past versions of Morpheus because they are designed to interact solely with other computers using the Gnutella software protocol. These Gnutella-based software programs, including programs from companies with no relationship to

StreamCast such as LimeWire, BearShare and Xolox, independently join together to form a network of tens of thousands of interconnected but independently owned and controlled computers which is commonly known as the "Gnutella Network." For a basic discussion of the Gnutella protocol, see Declaration of Steve Gribble and Exhibit "2" to Declaration of Colbern C. Stuart III. Morpheus 2.0 is designed to interact with other computers on the user-created Gnutella Network.

11. All former versions of Morpheus, including version 1.2 and 1.3, did not operate on the Gnutella Network or use Open Source software, but operated on a different network created by users of the Kazaa software product which uses a protocol known as the "FastTrack" protocol. No version of Morpheus shipped after March 1, 2002 has been designed to utilize the FastTrack protocol or Kazaa source code.[1]

12. Morpheus users may search for and share any kind of computer file (including text, images, audio, video, and software files) with any other user of the Gnutella Network regardless of whether the other users are running the Morpheus software application or some other Gnutella-based application, such as LimeWire, BearShare or Xolox.

13. Each Morpheus user has the option of "sharing" files

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[1] In February 2002, Defendant Consumer Empowerment breached its licensing agreement with StreamCast, effectively revoking StreamCast's ability to continue to utilize Kazaa's FastTrack peer-to-peer technology in StreamCast's Morpheus software product. As a result, the vast majority of these earlier versions of the Morpheus software are no longer functional. StreamCast was forced to re-engineer its software product to incorporate other peer-to-peer technology. This technology, known as Gnutella, is discussed in detail in the Declaration of Steven Gribble, Phd. ("Gribble Decl."). Morpheus 1.2 and 1.3, which were based in the "Fast Track" protocol, cannot interoperate with Morpheus Preview Edition, 1.9, and 2.0.

on the user's computer, or making such files available to other users of the Gnutella Network for downloading. In order to share a file, a user must identify which files or folders the user wishes to make available for sharing with other users of Morpheus 2.0. A user is not required to share any files in order to use the software.

14. There are a number of ways a user can locate other computers on the Gnutella Network, none which involve any control or activity by StreamCast. The initial search for another computer connected to Gnutella Network is known as "bootstrapping," because the computer must locate another computer without first knowing the location of that computer; effectively "pulling" itself onto the Gnutella Network "by the bootstraps."

15. Morpheus 2.0 can "bootstrap" in three ways; by "entering an IP address," by contacting a "hostcache" or by "GwebCache."

16. First, a Morpheus user can connect to the Gnutella Network by typing in the IP address of another computer connected to the Gnutella Network. The user obtains the IP address by plain old word of mouth (talking to another network user) or by using an Internet search engine such as http:///www.Google.com, which finds web sites listing IP addresses of connected computers.

17. Second, Morpheus Preview Edition, 1.9, and 2.0 can contact a computer known as a "hostcache" to obtain a list of IP addresses of other computers active on the Gnutella Network. A hostcache is a computer, that keeps a running list of the IP addresses of Gnutella "client" computers, which have contacted it recently and are, presumably, "active" on the Gnutella Network. A number of computers on the Internet serve as hostcaches for the Gnutella Network. Hostcaches generally do not receive or store any information regarding the content being transferred or shared by the

computers that contact it. The Gnutella client contacts the hostcache computer, which sends the Gnutella client a list of "active" IP addresses, while at the same time logging the Gnutella client's IP address, adding it to the hostcache's list of "active" IP addresses. The next Gnutella client contacting the hostcache will thus receive a list of IP addresses similar to the previous Gnutella client, plus possibly the IP address of the previous client. In this way the hostcache keeps the list of IP addresses as current as possible. Morpheus automatically contacts a server at Gnutellanet.com, a popular Gnutella peer-to-peer community website which maintains lists of hostcaches. StreamCast has never owned operated or controlled a hostcache server.

18. In addition to contacting a hostcache, Morpheus 2.0 (but not Morpheus Preview Edition and version 1.9) may also "bootstrap" by contacting a "GwebCache." A "GwebCache" is a server which acts much like a hostcache, but instead of logging each IP address which contacts it, a GwebCache acts as soley to receive, store, and provide IP addresses for Gnutella clients which contact it. A Gnutella client contacting a GwebCache normally exchanges a list of IP addresses it has contacted recently in exchange for a list of IP addresses which the GwebCache has received recently. Through the exchange of lists of IP addresses, the GwebCache maintains a list of "active" IP addresses. StreamCast has never owned, operated or controlled a GwebCache server.

19. There are several other methods that a Gnutella client or computer user may use to obtain a list of IP addresses of "active" computers on the Gnutella Network, including IRC chat, and instant messaging software. Morpheus does not utilize these alternative methods.

20. Once Morpheus obtains at least one IP address for a "possibly active" computer on the Gnutella Network, it

contacts the computer or computers until it locates a computer that is linked to the global Gnutella Network.

21. After the initial "bootstrap", Morpheus 2.0 keeps its own list of "active" IP addresses and can rely on its own list of IP addresses to connect to the network during subsequent connection attempts.

22. In order to operate the peer-to-peer functionality of Morpheus 2.0, users are not required to identify themselves with any "user name" or other unique word or code. The Gnutella Network does not require or support a user-specific account or unique name. Thus, unlike the Napster system, it is not currently possible to identify a Gnutella user with a unique screen name, user name, or account identifier. StreamCast also does not utilize such identifiers as a requirement for using the peer-to-peer functionality of Morpheus 2.0.

23. The only identifying information required for connecting to the Gnutella Network is an IP address, which enables other computers to locate and interact with each other while connected to the Internet. An IP address is not an effective method of identifying an individual user because IP addresses for Morpheus users typically change each time the user logs onto the Internet. StreamCast does not maintain any log of the IP addresses of users who connect to the Gnutella Network.

24. A Morpheus 2.0 user who chooses to search the Gnutella Network must enter a search term or terms (a "search string") into the Morpheus software's Search screen on the user's computer. Exhibit "1" attached hereto is a true and correct copy of a screen print from the Morpheus 2.0 "Search" page. The Morpheus 2.0 software then begins transmitting the search request to each of the other computers on the Gnutella Network which is directly connected to, which in turn pass along the search request to other

computers, which themselves pass along the request to other computers. (Morpheus 2.0, but not Preview Edition or 1.9, also searches a file's "metadata" – information that is not part of the file's content, but contains information about the file's content, such as author, file formatting, date or original creation, or the like.) Like a giant game of "Telephone," the search request propagates through the Gnutella Network to other computers connected to the Network. See also Gribble Decl., paras. 28-32. Morpheus version 1.9, like several other Gnutella applications, could select users on high-performance computers to serve as "ultrapeers." In this role, the high-performance computer provided indexing services for a number of lesser-performing computers, thereby improving the efficiency of searches in the network. The Morpheus software selected ultrapeers by employing its own internal algorithms – StreamCast plays no role in promoting or demoting computers to or from ultrapeer status. At no time does any search request from a Gnutella client (including any edition of Morpheus) pass through any computer owned or controlled by StreamCast.

25. The Gnutella Network is "self-organizing," in that the users communicate with each other without assistance from any central server or network, including StreamCast. StreamCast does not operate any computers, software programs or services or perform any function to support the formation of the Gnutella Network.

26. As each Morpheus user's computer locates other computers on the Gnutella Network, it exchanges certain information with these other computers. One category of information it exchanges is the IP addresses of other computers which are connected to the Gnutella Network. Each time a computer on the Gnutella Network encounters another computer located on the Network, the computers exchange their own IP addresses as well as a list of IP

addresses belonging to other computers which were recently connected to the Gnutella Network. Therefore, each Morpheus program maintains a list of "recent" IP addresses on the network which it constantly updates and exchanges with other computers connected to the Network. StreamCast does not receive or maintain a list of IP addresses of any computers connected to the Gnutella Network.

27. Morpheus 2.0 allows users to search and download files from other computers on the Gnutella Network. To obtain a file from a search result, a user of Morpheus must select a file from the search result. Selecting a file from the search results establishes a direct connection between the searching computer's computer and the computer on which the desired file is located (the "host computer").

28. Because the Gnutella Network is self-organizing, StreamCast has no involvement whatsoever in a Morpheus user's use of the peer-to-peer functionality of the application. For users who chose to utilize the peer-to-peer functionality of Morpheus 2.0, all processes necessary to carry out that function are performed by computers or entities other than StreamCast. StreamCast does not maintain any indexes of files on the Gnutella Network, does not process search requests, does not compile search results, does not send or receive search results to or from a user, and does not monitor searches or displays of search results. Morpheus does not report any information on the content of searches to any StreamCast computer server. StreamCast's servers do not participate in identifying locations or titles of user files, do not participate in requesting those files for transfer, do not participate in the transfer files from one user to another, do not control or monitor transfer of files, and do not control or monitor management or use of files. StreamCast's servers receive no information regarding any particular files being transferred among users.

29. The Morpheus product is widely available from third parties and on various peer-to-peer networks (many users place the Morpheus software "install" file in their shared folder) or the Internet at large at sites such as CNET's Download.com. Because the product has already been widely distributed, StreamCast cannot stop a particular person or computer from obtaining a copy of the Morpheus product and cannot disable the peer-to-peer functionality of any particular installed program.

30. The interaction between a Morpheus 2.0 user's computer and StreamCast's servers is very limited. On initial install of the Morpheus application, Morpheus requests the user's email address and the connection speed of the computer the software is installed on. The user is requested to supply certain demographic information (e.g., email address, age, zip code). If the user chooses to submit this information, the information is submitted to StreamCast. StreamCast uses this information to better understand the consumers of its software product.

31. In addition, the product contains two components that activate the user's Microsoft Internet Explorer "browser" software when the software is running on a user's computer, regardless of any activity by the user. These components contact web servers maintained by StreamCast, which provide the background graphics for the user interface of the Morpheus 2.0 Home Page, as well as banner and pop-up advertisements that appear whenever the user is running the Morpheus software. A true and correct copy of the Morpheus 2.0 "Home" page is attached hereto as Exhibit "2." The browser component contacts StreamCast's servers to obtain changeable "Home" page background graphics for the "Home" page of the Morpheus user interface. The background graphics make the software user interface attractive, give StreamCast Networks the chance to broadcast

messages and information to Morpheus software users, and permit advertising. The other component calls on other servers of StreamCast Networks or other companies, which send advertisements into a window at the bottom of the software's user interface. This Internet browser operates in the black rectangular space along the bottom edge of Exhibits "1," "2," "3," "4," and "5".

32. Both the "Home" page graphics and the advertisements are obtained by the user's Microsoft Internet Explorer program whenever the Morpheus software program is running and is connected to the Internet, regardless of the activity of the user. Thus, even if one engages in no searching, sharing, downloading, or playing of media files, the graphics and advertising will be displayed on the software interface. As such, the advertisements sold by StreamCast Networks are operated independent of the use of the peer-to-peer application.

33. Each time a user starts Morpheus 2.0, the Morpheus software sends an Initiation notification to StreamCast's servers. This message consists of a Microsoft Windows-generated serial number, along with the duration of the computer's last connection to the Internet. This permits StreamCast to maintain a rough estimate of how many instances of the software are running and how often. This functionality is not necessary to run Morpheus, including the peer-to-peer functionality.

34. A user of Morpheus 2.0 may chose to download and install a chat/instant messaging tool created by PalTalk. PalTalk licenses its chat/instant messaging software to StreamCast. A Morpheus 2.0 user may sign up for a PalTalk account, but need not do so to perform any other function of the software. Should a user decide to sign up for PalTalk, the user interacts with PalTalk to establish and maintain any such account. Morpheus does not maintain chat or instant

messaging servers and does not monitor any user's PalTalk accounts. Morpheus' instant messenger is not involved with the peer-to-peer functionality of the software.

35. StreamCast also licenses shopping software from Wurld Media, which it re-brands as the Morpheus Shopping Community. Users may use the Morpheus Shopping Community application to shop on the Internet and earn cash back from certain online merchants. Wurld Media designs and maintains the shopping page and the shopping application. All content and interaction with the Morpheus Shopping Community is independently managed by Wurld Media and no shopping activity takes place on StreamCast servers. A true and correct copy of the Morpheus Shopping Community page is attached hereto as exhibit "3".

36. Each of these interactions with StreamCast is independent of the file-sharing functionality of the Morpheus software. If every third party software provider were to cease operations, it would have no affect on a Morpheus user's ability to join the Gnutella Network, search for, share or download files. To the best of StreamCast's knowledge, none of the licensed software discussed above provides the third party licensors with any ability to discover, monitor or control what files users search for, choose to share, or download. Nor do they have any ability to alter, disable or upgrade the Morpheus software once it has been downloaded.

37. In sum, once a user has installed Morpheus 2.0, StreamCast Networks has no effective control over a users' sharing of files on the Gnutella Network. Users must elect to run the software, and determine what (if any) files they wish to place in their "shared folder" on their hard drive. Users decide whether to use the software to connect to the Gnutella Network, a public, decentralized, network not affiliated with or in any way controlled by StreamCast. StreamCast cannot

control what users decide to search for, find, make available, or download over the Gnutella Network. Because the Gnutella Network does not require or accept unique usernames or other identifiers, StreamCast has no control over Morpheus 2.0 users' access to the Gnutella Network.

38. If StreamCast Networks ceased to operate, if its servers became inoperative (as has happened on occasion owing to technical malfunctions or maintenance) or if all network connections to StreamCast servers were severed, the searching, indexing, transferring, downloading, managing, display and play functions of Morpheus would continue unaffected. Indeed, there currently exists a number of users of former, outdated versions the Morpheus software product who have chosen not to upgrade to newer Morpheus versions, but nevertheless have joined together and continue to operate a peer-to-peer user network using Morpheus software. That these networks are able to continue to operate without StreamCast Networks' involvement demonstrates that StreamCast Networks has extremely limited ability to control the users' use of the peer-to-peer function of the product.

39. StreamCast's "policies" web page expressly acknowledges this lack of control over users of the software: "Due to the nature of peer-to-peer software, StreamCast Networks is unable to monitor or control the types of files shared within the Morpheus community. If you locate a file being shared by a user who you believe may be in violation of copyright law, please report your concerns to the user directly." A true and correct copy of this policy is attached hereto as exhibit "6"

40. Although StreamCast has no contractual relationship with Morpheus users, the Wurld Media shopping functionality of the software does require that users agree to an "end user license agreement" with Wurld Media. As

discussed *supra*, none of these third party bundled applications is involved in the P2P networking functions of the Morpheus software. Moreover, StreamCast itself does not utilize such an agreement.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Scottsdale, Arizona on September 8, 2002.

By /s/
Darrell Smith

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF STEVEN D. GRIBBLE, PH.D., IN SUPPORT OF DEFENDANT MUSICCITY.COM, INC.'S (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC.'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I, Steven D. Gribble, hereby declare as follows:

1. I am an assistant professor in the Department of Computer Science and Engineering at the University of Washington. I have a Ph.D. and Masters Degree in Computer Science from the University of California at Berkeley. My research focus includes wide-area content/data delivery, distributed computing, and peer-to-peer systems, including quantifying the effectiveness of existing peer-to-peer architectures such as Gnutella. I currently teach graduate and undergraduate courses that include coverage of peer-to-peer systems and distributed computing, and I have authored and presented several research papers on both subjects. My curriculum vitae is attached as Exhibit 1.

2. I make this declaration in support of Defendants' motion for summary judgment. In particular, I have focused on the following:

(a) the structure and operation of versions 1.9 and 2.0 of the Morpheus[1] software ("Morpheus"), including the implementation of the Gnutella file-sharing functions within the software;

(b) the interactions between Morpheus and StreamCast servers; and

(c) differences between the Gnutella Network (as accessed via Morpheus) and Napster.

3. Except where otherwise indicated, I make this declaration based on my own personal knowledge, including my review of certain documents and other artifacts referred to in this declaration – such as the Morpheus software and source code. If I am called as a witness before the Court, I could and would testify to the matters set forth herein.

STRUCTURE AND OPERATION OF MORPHEUS

Overview of Morpheus.

4. At its highest level, Morpheus is a communications tool that allows users of the software to connect together to form a network. Morpheus 2.0 is the current version of the Morpheus software. It is based on a particular implementation of the Gnutella network protocol (explained more fully below) known as "Jtella." Morpheus 1.9 was the most recent version of the Morpheus software before version 2.0. It is based on a different implementation of the Gnutella network protocol known as "Gnucleus." Throughout this

[1] Version 1.9 is based on a Gnutella client known as "Gnucleus" and version 2.0 is based on a Gnutella client known as "Jtella". Previous versions of Morpheus of which I am aware, but which are not discussed in this declaration, include the following: version 1.3 (based on the Kazaa network protocol known as FastTrack) and "Morpheus Premium Edition" (which, like version 1.0 was based on "Gnucleus"). To my knowledge, StreamCast no longer distributes these versions.

declaration, whenever I refer to "Morpheus," I am referring to both Morpheus 1.9 and Morpheus 2.0, which have similar overall functionality. When necessary to point out differences between the two versions, I will refer to "Morpheus 2.0" or "Morpheus 1.9" as appropriate.

5. To assist the Court, I have attached as Exhibit 2 a glossary of technical terms used in this declaration and in other related documents filed by Defendants in this matter.

6. Morpheus is a bundle of various applications that allows users to communicate with one another over a network. These applications include a Gnutella file searching/sharing component (based on Gnucleus or Jtella, respectively), an Instant messaging component, a web-browser, an ad-serving component, and a media file manager (which organizes and plays multimedia files).

7. The file-sharing functions of Morpheus do not depend on the other components to function correctly. I have directly verified this by manually blocking Morpheus from communicating with StreamCast servers in order to simulate the impact of having shut down or disabled the StreamCast servers. I observed that, even with this blocking in place, the file-sharing components of an existing Morpheus node were able to continue to operate on the Gnutella network unaffected. Moreover, new Morpheus nodes were still able to successfully be installed and join the Gnutella network.

Overview of Gnutella.

8. The file searching and sharing capabilities of Morpheus are based on Gnutella. Gnutella is a simple "peer-to-peer" networking protocol that enables members (i.e., peers consisting of privately-owned and -operated computers) to communicate directly with each other over the public Internet in a completely decentralized manner; i.e., without any reliance on a central website or other central

facility. The Gnutella protocol includes various simple facilities to allow peers to (a) identify and connect to other peers in the Gnutella network, (b) search the Gnutella network for files stored by other peers, and (c) exchange files between peers. Users of the Gnutella protocol (including Morpheus) may search for and share any kind of digital file (including text, images, audio, video, and software files) with any other user on the Gnutella network.

9. Gnutella is an open protocol, which means that (a) its implementation details are publicly available for everyone to use, and (b) its development and evolution are the result of collaboration in an open forum in which anybody can participate. Anyone can implement the protocol by creating Gnutella-compatible software (a "Gnutella client") that will enable users to access and use the Gnutella network (and, in fact, many have). Because all Gnutella clients are based on implementations of the same, open protocol, a Gnutella client will interoperate with other Gnutella clients developed by other entities, thereby forming a single, worldwide network that is described as the Gnutella Network (or GnutellaNet). Morpheus is only one of several Gnutella clients that are available; others include Gnucleus, Limewire, Bearshare, Jtella, and Xolox. Users of any one of these products can search and share files with users of any of the others.

10. The Gnutella Network has a completely decentralized communications structure that is easily distinguished from the centralized structure that is prevalent on the Internet. Most communications over the Internet occur over a centralized network structure commonly referred to as the "client-server" model. In this model, clients connect to and communicate with servers; several clients may be simultaneously connected to the same server, but the clients are not connected to each other. *See* Exh. 3. In the client-server model, the server typically contains most

of the functionality, receiving requests from clients and distributing responses back to clients. Clients typically have limited functionality, in that they rely on the servers to provide useful information or computation.

11. As compared to the centralized structure described above, the Gnutella Network is a completely decentralized network of individually owned and operated peers having no centralized server or other central facility. Each peer (i.e., a computer running a Gnutella client) is connected to several other peers in the network. All peers have the ability to act as both a client and a server in the network[2]. *See* Exh. 4. This structure has various implications for operation of the Gnutella Network:

> (a) First, this decentralized structure makes Gnutella extremely robust. Because there is no central, single point of failure, the failure or termination of a single peer has virtually no impact on the continued operation of the network as a whole. Even if a majority of peers shut down, the network will most likely continue to function. Indeed, research into peer-to-peer networks has demonstrated that most of the peers that participate in the Gnutella network only remain connected for short periods of time, implying that over the period of several hours, the structure and membership in the Gnutella network undergoes significant change, all the while continuing to operate correctly.
>
> (b) Second, no one entity, including

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[2] In fact, many Gnutella developers refer to the Gnutella client as a "servent," which is an amalgam of the words "*server*" and "cli*ent*". For convention, we will simply use the term "Gnutella client" when referring to the Gnutella-compatible software running on peers of the Gnutella Network.

StreamCast, has the power to control the Gnutella Network or to shut it down. In a centralized structure, the central server is typically owned and operated by, or on behalf of, a specific entity (e.g., Yahoo). This entity has the ability to control the operation of the central server, and as a result, this entity can affect the operation of the service. For example, if a central server is accessed or used in an unauthorized manner, the server operator can deny access to unauthorized users, or completely shut down the server. In contrast, because GnutellaNet has a completely decentralized structure where all peers serve essentially equal roles, no one peer has the ability to control the network or to shut it down without the willing acquiescence of the great majority of other peers in the network (which, of course, is extremely unlikely). In other words, because the Gnutella Network is a completely decentralized collection of individually owned and operated peers, it is self-organizing and self-sustaining, and operates solely based on the collective decisions of its peer members. No one entity or peer has the ability to dictate the operation of the entire network, or for that matter, to completely dictate the operation of any other peer owner/operator in the network.

12. Another benefit of a decentralized network structure is the potential to eliminate the "scaling bottleneck" of a centralized server. As the popularity of a centralized service grows, the centralized server must grow more powerful (in terms of computing power, storage capacity, and/or network bandwidth) in order to support the increasing demands of a growing client base (as more clients connect to the central server). Operating a server at very large scales has many technical, administrative, and economic challenges. In a

decentralized network, the burden of serving the demands of numerous clients is spread across participants in the network. As a result, as the service grows more popular and more clients to join, the increasing population of clients inherently contributes more resources to the decentralized network. If the protocols governing the behavior of the decentralized network are carefully designed, this results in a naturally scalable system: more users become a boon, rather than a burden.

File-Sharing Operation of Morpheus.

13. Because Morpheus includes specific implementations of the Gnutella client, I will describe the file sharing operations of the Gnutella Network in the following paragraphs with reference to Morpheus. As will be highlighted more fully below, after a user downloads and installs Morpheus on her computer, StreamCast servers have no ability to monitor or prevent the use of Morpheus to join the Gnutella Network, designate files for sharing, select files for searching, or select files for downloading. All of these operations are at the discretion of the user. Once installed, the file sharing components of Morpheus operate according to the Gnutella protocol as described above (connecting to Gnutella network, searching for files, exchanging files) without any need for further interaction with StreamCast or any of its servers.[3]

Download and Installation.

14. To begin using Morpheus, a user must first

[3] Morpheus 2.0 includes a facility for the client to receive tuning parameters from StreamCast servers to enhance the network performance of certain file sharing operations. Even if the StreamCast servers were shut down or unavailable, the inability to receive these parameters would not prevent the file sharing components of Morpheus from operating correctly.

download a Morpheus installer program to her computer, and then execute the installer. For Morpheus 2.0, the installer program is called "Morph2.0.exe", which can be downloaded by visiting the "Download.com" web site (at http://do nload.com) that is owned and operated by CNET Networks, Inc. The Download.com web site counts the number of downloads that have occurred, provides a forum through which users can comment on the program, and provides a link to the Morpheus installer itself, which appears to reside on servers operated by Download Technologies, Inc.

15. In addition to being available through Download.com, the Morpheus installer can also be accessed from existing Gnutella peers on the Gnutella Network. If a user already has a Gnutella client installed, she can use it to search for and download the installer from other Gnutella peers on the Gnutella Network in the manner described below. Alternatively, the user can use one of the publicly-operated Gnutella-to-web gateways (i.e., a web site that gives a user of the World-Wide Web access to the Gnutella Network), such as the "AsiaYeah" web site (at http://www.asiayeah.com), to search for and download the Morpheus installer.

16. The installer program for Morpheus 1.9, called "morph19.exe," is no longer available at Download.com, and is no longer supported by StreamCast. Nonetheless, it can be accessed from existing Gnutella peers on the Gnutella Network as described above, or by accessing other third-party web sites unrelated to StreamCast who may continue to host copies of the Morpheus 1.9 installer.

17. Once the Morpheus installer has been downloaded, the user launches the installer, which places various files in different folders in her computer. For Morpheus 2.0, the installer also checks to see whether or not the Java runtime

environment exists on the user's computer. If the Java runtime environment has not already been installed, the installer prompts the user to download and install it.[4]

18. None of the foregoing download and installation procedures described above require any interaction with StreamCast or any StreamCast servers. In fact, shutting down StreamCast's servers would not prevent users from accessing and running the Morpheus installer. Users could still locate the Morpheus installer on the World-Wide Web at sites such at Download.com or AsiaYeah, or via various file-sharing services, such as GnutellaNet. All of these channels are completely independent of StreamCast. Similarly, the Java runtime environment that is necessary to run the file sharing components of Morpheus is available through multiple channels, each of which are completely independent from StreamCast.

Initial Launch and Setup

19. Morpheus 1.9 and 2.0 have slightly different setup procedures. When Morpheus 1.9 is first launched, it prompts the user to type in her user name, password, e-mail address, and certain other demographic information. It appears, however, that none of this information is required by StreamCast. In fact, the information appears to have no purpose other than to register the user with PalTalk, the third-party instant messaging service that comes bundled with Morpheus, and is also used when logging into the service on subsequent sessions. During installation, Morpheus 1.9

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[4] Because Jtella, the Morpheus 2.0 Gnutella client, is written principally in Java code, the Java runtime environment is needed for the file searching/sharing components of Morpheus to work. Many different versions and brands of the Java runtime exist, all of which are written, packaged, and distributed by third-party vendors (such as Sun Microsystems).

attempts to upload all of this information to servers operated by, or on behalf of, PalTalk. If Morpheus 1.9 is unable to contact the PalTalk server, Morpheus 1.9 continues unaffected. The Failure to send this information to PalTalk has no effect on the installation or operation of Morpheus 1.9, including the file searching/sharing components of Morpheus 1.9. Based on my review of the Morpheus 1.9 source code, and my observations of Morpheus 1.9 while executing, there is no other place in Morpheus 1.9 where this information is used or required. Therefore, it is my conclusion based on the foregoing that the sole purpose of this information is to register the user with PalTalk and the log into the PalTalk service during subsequent sessions.

20. When Morpheus 2.0 is first launched, it prompts the user to type in her email address only. Morpheus 2.0 attempts to upload this email address to a StreamCast server located at the address http://webservice.musiccity.com. If Morpheus 2.0 is unable to contact the StreamCast server, Morpheus 2.0 continues unaffected. Failure to send the e-mail address to StreamCast has no effect on the installation or operation of Morpheus 2.0, including the file searching/sharing components of Morpheus 2.0. Based on my review of the Morpheus 2.0 source code, and my observations of Morpheus 2.0 while executing, I have not found anywhere else in Morpheus 2.0 where the e-mail is used or required. Therefore, it is my conclusion based on the foregoing that the email address is sent to StreamCast for informational or marketing purposes only.

21. In order to share files, a user of Morpheus must designate on her computer the files or folders that she wishes to make available for sharing over GnutellaNet. When Morpheus is first installed, a new folder (called "My Shared Folder") is created on behalf of the user and is automatically designated for sharing. The user may also add or remove

individual files and folders from the list of items that are shared, through a configuration screen available within Morpheus. Exhibit 5 shows a screen shot of the configuration screen for Morpheus 2.0; the configuration screen for Morpheus 1.9 operates in a similar manner. A user is not required to share any files in order to use Morpheus and Morpheus will not share any files or folders that have not been designated for sharing in the manner described here. Based on my analysis of the Morpheus source code and the operation of Morpheus, neither StreamCast nor any StreamCast server is involved in any way in the user's voluntary and individual act of designating certain files for sharing over GnutellaNet; and at no time does the act of designating such files require or involve the sending of any message or other information to/from a StreamCast server.

Connecting to the Gnutella Network (including "Bootstrapping").

22. To participate in the Gnutella network, the Morpheus program needs to find and connect to other Gnutella peers that are already participating in the Gnutella Network. Once one or more peers have been found, Morpheus can interrogate these peers to discover the IP Address[5] of even more Gnutella peers on the network. The process of figuring out to whom to initially connect is called

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[5] An IP address, or Internet Protocol Address, is a unique identifier for computers over the Internet. Domain names, such as www.StreamCastnetworks.com, are translated to IP addresses, such as 140.99.15.144, for addressing information sent over the Internet. In order for two computers to communicate over the Internet, they have to know each other's IP addresses or domain names. Each computer on the Internet does not necessarily have a permanent IP Address, however. Many Internet Service Providers ("ISP's") dynamically assign IP Addresses (from a range of IP Addresses assigned to the ISP) to users each time they log on.

"bootstrapping". There are at least three known mechanisms for bootstrapping a Gnutella client, each of which is outlined below. Morpheus 2.0 supports all three, while Morpheus 1.9 only supports the last two:

(a) Morpheus 2.0 contains support for interrogating the "GWebCache" system (described at http://www.zero-g.net/gwebcache) to find the IP Addresses of recently active Gnutella peers. The GWebCache system consists of a network of voluntarily participating web servers that are owned and operated by third parties unrelated to StreamCast. These web servers maintain lists of Gnutella peers, as well as lists of other GWebCache servers. When a Gnutella peer contacts a GWebCache server, it can choose to report its own IP address or the web address[6] of other known GwebCache servers[7]. As Gnutella peers come and go over time, each GWebCache server uses these reports to construct a list of most recent Gnutella peers and a list of other GWebCache servers. A Gnutella peer can query a GWebCache server to request either of these lists. Morpheus 2.0 comes bundled with the web addresses of several GWebCache servers. Upon launch, Morpheus 2.0 interrogates these servers, which respond with the IP Addresses of various computers that are already running a Gnutella client.

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[6] A web address, also called a uniform resource locator ("URL"), contains the domain name of the web server as well as the filename of the page within the server. An example of a web address is http://www.StreamCastnetworks/FullAbout.html.

[7] A GWebCache Servers does not receive information about what files are or have been traded by a Gnutella peer by virtue of being contacted by that peer for bootstrapping.

(b) Morpheus 1.9 and 2.0 also come bundled with the IP Addresses of several public, voluntarily run "host caches" that are owned and operated by third parties unrelated to StreamCast. A host cache is a Gnutella peer that keeps a list of the IP Addresses of other Gnutella peers that have contacted it most recently, and provides the list to each subsequent peer that requests it[8]. Its functioning is similar to a "GWebCache" server, except it communicates using the Gnutella protocol, rather than over the World-Wide Web.

(c) Using the Morpheus user interface, a user can manually type in the IP Address of a Gnutella peer to which it can connect. The user can find the IP Address by various means including, but not limited to, searching web pages, Internet chat, instant messaging, and the like. Even if all host caches and GWebCaches are disabled – which is unlikely due to their distributed nature – Morpheus could still successfully bootstrap via this method.

23. None of the bootstrapping methods described above require any interaction with StreamCast or a StreamCast server[9]. In fact, if all StreamCast servers were shut down, the ability of Morpheus to bootstrap to GnutellaNet would be unaffected.

24. Once Morpheus has located at least one other Gnutella peer via the bootstrapping method outlined above,

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[8] A Host cache does not receive any information about what files are or have been traded by a Gnutella peer by virtue of being contacted by that peer for bootstrapping.

[9] It is my understanding that StreamCast does not and has never maintained a GWebCache server or a host cache.

Morpheus will communicate with that peer to discover the IP Addresses of even more peers, as part of its regular operation. During regular operation, Morpheus attempts to maintain several Gnutella network connections to other Gnutella peers. These network connections link Morpheus into the Gnutella Network as shown in Exhibit 6. The circle having an "M" in the Exhibit represents the Morpheus peer under analysis, and the smaller circles represent other Gnutella peers (comprising other computers running Morpheus and other Gnutella clients developed by third parties – e.g., BearShare, LimeWire, Gnucleus, Xolox). The lines between the circles represent Gnutella network connections between peers.

25. Once Morpheus has bootstrapped a Gnutella Network connection, Morpheus can send messages over that connection. One message that Morpheus can send is called a "Ping" message. Any peer that receives a Ping message will (a) respond with a "Pong" message back to the Ping originator, and (b) forward the Ping message to the other peers to which it is connected. The Pong message contains the IP Address of the peer that generated it. Because Pings are forwarded to many peers in the Gnutella Network, a single Ping generated by a single Morpheus peer is received by a large number of peers[10], causing many Pong message replies. This provides Morpheus with the IP Addresses of other peers to which it can connect. By periodically sending out Ping messages and connecting to some of the peers that respond with a Pong, Morpheus can maintain many connections into the Gnutella Network, even if some peers

[10] For example, assuming that each peer is connected to eight (8) other peers and that a Ping message stays alive for seven (7) "hops" (the number of peer-to-peer transitions it will make before dying), then one PING message can reach up to $8^7 = 2{,}097{,}152$ peers. That is more than enough to reach most of the peers on GnutellaNet.

come and go over time.

26. Exhibits 7 through 10 illustrate this process. The Morpheus peer under analysis sends out a Ping message (represented by the arrows) to its neighbors, which causes each neighbor to forward the Ping message to its neighbors, and so forth. Eventually, Pong messages flow back to the Morpheus peer from the peers that received the Ping message. Pong messages flow back along the same path in the network from which the Ping message was received.

27. The sending and receiving of Ping and Pong messages as described above is a fundamental element of the Gnutella network protocol. No interaction with StreamCast servers is needed or required for the exchange of Ping and Pong messages between Gnutella peers – including Morpheus peers. Based on my review of the Morpheus source code, my observations of Morpheus while executing, and my review of other documents and things, it is my conclusion that none of the Ping or Pong messages generated by Morpheus are reported or relayed to StreamCast servers. Ping and Pong messages are produced as part of the inherent functioning of the Gnutella Network.

Searching for Files on GnutellaNet

28. File sharing activity begins when a user initiates a search for a file[11]. To initiate a search, the user types a search string into the "search" box on the Morpheus user interface. The search string consists of a string of words to describe the file that the user wants to find on the Gnutella Network. For example, a user might type in the word

[11] Unlike Napster, which could only search and share MP3 audio files, Morpheus – like all Gnutella clients – can be used to search and share all types digital files, including text, images, audio, video, and software.

"Shakespeare" to try to find documents that contain the works of William Shakespeare. Exhibit 11 is a screen shot of the search screen for Morpheus 2.0; the search screen for Morpheus 1.9 operates in a similar manner. In addition to containing a list of general words to match, a user of Morpheus 2.0 may also generate searches for files that have specific attributes (or "meta-data"), such as a search for a text document with a particular title, or an audio file from a particular artist. The Morpheus 2.0 user interface allows a user to indicate what type of file to search for, and for each file type (such as text, audio, and video), the user interface contains a list of attributes that can be searched against. *See* Exh. 12.

29. Once a user has typed in a search string, Morpheus packages the search string into a "Query" message. Morpheus sends the Query message to its neighboring Gnutella peers, and each neighboring peer forwards the Query message to its neighboring peers, and so on, in a manner similar to Ping messages. *See* Exhs. 13 through 15. In this manner, the Query message eventually propagates across the Gnutella network, reaching many peers. In addition to forwarding the Query message, each peer that receives a Query message checks it to determine if any of its local shared files (i.e., the files that the user has voluntarily designated for sharing over the Gnutella Network), match the search string. If there is a match, then the hosting peer (i.e., the peer that has a matching file stored in its local shared folder) generates a "QueryHit" message and sends it back to the Morpheus peer that generated the original Query message. The QueryHit message is sent back along the same path in the network from which the original Query message was received. *See* Exhs. 15 through 18.

30. Morpheus receives and processes QueryHit messages from all Gnutella peers, not just Morpheus peers.

Each QueryHit message contains the name of each file that matches the search string in the Query message – but not the file itself – and the IP Address of the hosting peer. For each QueryHit message received over GnutellaNet, Morpheus modifies its user interface to display the candidate files that match the Query. Exhibit 19 is a screen shot of the search results screen in Morpheus 2.0; the search results screen in Morpheus 1.9 operates in a similar manner. The user is able to look through the reported results, and decide whether or not any of the files are desirable. If so, the user selects a reported result (by "double-clicking" on a result, for example), which initiates a download of that file.

31. The candidate files listed in the Morpheus user interface are anonymous and are not distinguished by platform. Morpheus only displays certain basic information about the candidate file (e.g., file type, filename, and file size). No information identifying the user of a hosting peer, the hosting peer itself, or whether the candidate file is from a Morpheus peer or a non-Morpheus peer is displayed. *See* Exh. 19.

32. The sending and receiving of Query and QueryHit messages in connection with searching the Gnutella Network is a fundamental element of the Gnutella network protocol and is part of the inherent functioning of the Gnutella Network. No interaction with StreamCast servers is required for these messages to be exchanged between Gnutella peers. Based on my review of the Morpheus source code, and on my observations of Morpheus while executing, none of the Query or QueryHit messages generated as a result of searches conducted by voluntarily-participating Gnutella peers (including Morpheus peers) are reported or relayed to StreamCast servers. Therefore, it is my opinion that StreamCast has no ability to monitor or control the content of these messages that indicates the files being searched.

Downloading Files over GnutellaNet.

33. Each QueryHit message that flows back to a Morpheus peer contains the file name(s) of the candidate matching file(s), as well as the IP Address of the hosting peer. If Morpheus initiates a download of a candidate matching file, Morpheus uses the IP Address to create a temporary Internet connection directly between the Morpheus peer and the hosting peer (i.e., the peer hosting the file to be downloaded). Morpheus uses this temporary Internet connection to transfer the file from the hosting peer to the Morpheus peer. *See* Exh. 20. This transfer is accomplished using "HTTP", the standard World-Wide Web file transfer protocols. Morpheus 2.0 also includes an additional facility for using "PCP" for transferring files. PCP is a transfer protocol that can recruit other peers to participate in the transfer of the file in order to make transfers more efficient.

34. Based on my examination of the Morpheus source code, and observations of the Morpheus program during execution, information relating to file transfers between voluntarily-participating Gnutella peers does not to flow to any servers operated by StreamCast. File transfers only involve only the peer initiating the download, and the peer from which the file is served. As a consequence, it is my opinion that StreamCast has no ability to directly monitor or control what files are downloaded by Gnutella peers – including Morpheus peers.

Interaction Between StreamCast Servers and Morpheus

35. Based on my review of the Morpheus source code, and my observations of Morpheus while executing, it is my opinion that no interaction with the StreamCast servers is required in order for a user of Morpheus to carry out the file sharing operations described above. Other interactions

between StreamCast servers and Morpheus that are unrelated to the file sharing components of Morpheus include the following:

Ad Serving and Web Content Browsing

36. In addition to providing Gnutella file-sharing functions, Morpheus also contains components that display ads and web graphics. These ads and web graphics are supplied to Morpheus by servers operated by StreamCast and its partners. These ads and web graphics are used to (a) enhance the look of the Morpheus user interface, (b) provide Morpheus users with information about StreamCast, and (c) provide ads served by StreamCast or its advertising partners. This functionality makes use of the built-in web browser functions provided by the Microsoft operating system, and is completely independent from any file-sharing functions in Morpheus. I have verified that even if Morpheus is prevented from contacting the StreamCast servers that supply the web graphics and advertisements, the Gnutella file-sharing functions in Morpheus continue to operate unaffected.

MusicCity Shopping Community

37. Morpheus also contains a component called the MusicCity Shopping Community. This component consists of a dynamic link library ("DLL") (i.e., a piece of code that is installed as an extension to the Windows operating system) and a database of participating web sites. When Morpheus is installed, the DLL and database are installed in Windows. When Morpheus is launched, Morpheus appears to check servers operated by or affiliated with StreamCast for new versions of the DLL and database. I have verified that if no new versions are found, or if Morpheus is unable to contact the web servers to check for new versions, then the Gnutella file-sharing components of Morpheus continue to function unaffected.

Update Feature

38. Morpheus 2.0 also contains a mechanism for detecting and installing updates to the various components of the Morpheus bundle[12]. The purpose of the update feature appears to be to simplify the distribution of "bug patches" to repair errors contained in the existing components of the bundle, or to simplify the distribution of new components (i.e,. new functionality) over time. When Morpheus is launched, it contacts a web server that is operated by, or on behalf of, StreamCast. This web server responds with the most current version numbers of the various Morpheus components, including the Gnutella file sharing component, the Instant messaging component, and the Morpheus media manager component.

39. If Morpheus 2.0 detects that any of its components are out of date, it brings up a dialog box alerting the user of this fact, and prompts the user for her permission to download the updated components. If the user indicates "yes" by clicking on the appropriate icon, then Morpheus attempts to download the updated components from designated servers[13]. When the updated component has been downloaded, Morpheus notifies the user, and prompts the

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[12] Morpheus 1.9 also includes an update feature, but it has no effect on Morpheus. The feature attempts to obtain updates from Gnucleus that are incompatible with Morpheus. I have not been able to get the feature to work, and even if it did work, it would result in the installation of a file that Morpheus would not recognize or use.

[13] As previously mentioned, Morpheus 2.0 includes support for a protocol known as the PCP Protocol. This protocol is used during the distribution of updates, which spreads the burden of serving updates across Morpheus peers, in addition to StreamCast servers. The PCP Protocol appears to be implemented in Morpheus 2.0 by bundling code from a company called PCP Networks.

user for permission to install the update. If the user indicates "yes" by clicking on the appropriate icon, then the update is installed, and the affected Morpheus component is updated. No new software is downloaded or installed on the user's computer without the user's voluntary decision to do so, as manifested by her response to at least two separate prompts.

40. The above-described update feature has no impact on the operation of the file sharing components of Morpheus 2.0 – except and only to the extent that the user elects to update the file sharing components themselves via the update feature. I have verified that if the update feature is disabled, or if access to the update servers is blocked, then the Gnutella file sharing components of Morpheus will continue to operate unaffected.

DIFFERENCES BETWEEN GNUTELLANET AND NAPSTER

41. To assist the Court in this matter, I thought it would be helpful to highlight the significant differences between centralized file indexing systems like Napster and completely decentralized networks like GnutellaNet, especially as those differences should impact the issue of monitoring and control of the network.

42. The first and most fundamental difference between Napster and Gnutella is the way in which each network is organized to respond to search requests. Napster's searching functions were structured on a centralized client-server model as described above. Napster, Inc. maintained a central server into which all Napster clients were connected. On this server, Napster maintained a list of all files that Napster clients connected to the server had available for sharing. When a Napster user wanted to search for a particular file, she sent a search request directly to the Napster central server. *See* Exh. 21. The Napster central server compared the search term to its index of available files and compiled a list of matching files along with the IP addresses of all

computers on which the files were stored (the "host" computer). This list was sent back to the requesting client. *See* Exh. 22. Thereafter, if the requesting client wanted to download the file, they would select it (by "double-clicking on it, for example). Using the IP Address provided above, the Napster client then created a temporary direct connection with the host computer to download the desired file. *See* Exh. 23.

43. In contrast, the Gnutella Network is a completely decentralized network of individually owned and operated peers having no centralized server or other central facility (i.e., there is no central file server as in Napster). Each peer (i.e., a computer running a Gnutella client) is connected to several other peers in the network. All peers have the ability to act as both a client and a server in the network. When a Gnutella peer sends out a search request, it transmits the request to each of the peers on the Gnutella Network to which it is directly connected. In turn, these peers pass along the search request to the peers to which they are directed connected, and so on, until the search request propagates through the Gnutella Network to most of the peers in the network. Gnutella peers having files that match the search request respond to the requesting peer. Each response is sent back along the same path the search request traveled through the Gnutella Network. See Exhs. 13 through 18.

44. One consequence of Napster (the company) having maintained a central server is that the company was able to accurately monitor which files the users of the Napster software were sharing. Another consequence is that the company was able to filter specific files from the search results it returned to Napster clients, effectively preventing those specific files from being shared (by making them impossible to find during a search). Because Gnutella has no central server, there is no single entity that can monitor or

affect searches in this manner. Searching is implemented as a decentralized, cooperative activity across the Gnutella network.

45. A second difference between Napster and Gnutella is that Gnutella is an open protocol. In other words, the way in which Gnutella clients connect to one another, process search requests, respond to search requests, etc., is freely published, and the development and evolution of this protocol is guided by an open forum in which anybody can participate. Because the protocol is freely published, anyone can write Gnutella compatible software that is capable of interoperating with other Gnutella-based software. As explained above, this in fact has happened as there are many Gnutella-based clients such as Limewire, Bearshare, and now Morpheus 2.0.

46. In contrast, the Napster service used a proprietary, closed protocol, which allowed Napster, Inc. to limit access to its servers to only those computers running Napster, Inc.-developed software[14]. No entity, including StreamCast, exercises such a measure of control over the Gnutella Network.

47. A third difference between the Gnutella and Napster networks is that the Gnutella Network is designed to allow for file sharing of all file types. The Gnutella Network allows file sharing of any kind of computer file, including text files, photo files, music files (such as "MP3" files) and video files. In contrast, the Napster network was only designed to allow file sharing of MP3 files. Thus, the potential (and actual) uses of the Gnutella Network are far broader than the Napster Network.

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[14] An exception to this was the "OpenNap" community who reverse-engineered the Napster protocol without Napster, Inc.'s authorization.

48. Attached hereto as Exhibit 1 is a true and correct copy of my curriculum vitae.

49. Attached hereto as Exhibit 2 is a true and correct copy of a glossary of the technical terms used in this declaration and in other related papers filed by Defendants.

50. Attached hereto as Exhibit 3 is a true and correct pictorial representation of a centralized network structure.

51. Attached hereto as Exhibit 4 is a true and correct pictorial representation of a decentralized network structure.

52. Attached hereto as Exhibit 5 is a true and correct copy of a screen shot of the configuration page used in Morpheus 2.0 to designate certain user files for sharing over the Gnutella Network.

53. Attached hereto as Exhibit 6 is a true and correct pictorial representation of a Morpheus client connected to various Gnutella peers in the Gnutella Network.

54. Attached hereto as Exhibits 7 – 10 is a true and correct pictorial representation of the process by which a "Ping" message generated by Morpheus is distributed across the Gnutella Network resulting in many "Pong" messages in reply.

55. Attached hereto as Exhibit 11 is a true and correct copy of a screen shot of the search page used in Morpheus 2.0 to enter a search string.

56. Attached hereto as Exhibit 12 is a true and correct copy of a screen shot of the search attributes page used in Morpheus 2.0 to enter search attributes.

57. Attached hereto as Exhibits 13-15 is a true and correct pictorial representation of the process by which a search "Query" message generated by Morpheus is distributed across the Gnutella Network.

58. Attached hereto as Exhibits 16-18 is true and correct pictorial representation of the process by which peers in the Gnutella Network having files that match the search "Query" message respond with a search "Query Hit" message.

59. Attached hereto as Exhibit 19 is a true and correct copy of a screen shot of the search results page in Morpheus 2.0.

60. Attached hereto as Exhibit 20 is a true and correct pictorial representation of the process by which Morpheus establishes a direct and temporary connection with another Gnutella peer in order to transfer a file.

61. Attached hereto as Exhibit 21 is a true and correct pictorial representation of the process by which a Napster client transmits a search request directly to the Napster central server.

62. Attached hereto as Exhibit 22 is a true and correct pictorial representation of the process by which the Napster central server responds with a list of files if it finds matching files listed in its index of available files.

63. Attached hereto as Exhibit 23 is a true and correct pictorial representation of the process by which a Napster client establishes a direct and temporary connection with another Napster client in order to transfer a file.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Seattle, Washington on September 9, 2002.

/s/

Steven D. Gribble, Ph.D

GLOSSARY OF TERMS

Bootstrapping:

When a Gnutella servent is launched, it needs to find other Gnutella servents with which it will interact. The process of initially finding these other Gnutella servents is called "bootstrapping". There are many different mechanisms by which a Gnutella servent can bootstrap itself, including querying a GWebCache server, querying a Gnutella host cache, or having a user manually type in the IP addresses of other Gnutella servents. Once a Gnutella servent has bootstrapped a network connection to another Gnutella peer, it use the Gnutella protocol itself (i.e., it can send Ping messages and receive Pong messages) to discover the IP addresses of additional Gnutella servents.

Broadcasting:

Messages on the Gnutella Network are sent in one of two ways. First, they may be broadcast, or sent to all hosts that are within a certain distance (or "network horizon"). Pings and search requests are broadcast over the Gnutella network. Second, messages may be routed, or sent only to particular location. Not all routed messages go directly to their intended recipient; they may pass through other hosts in transit. For example, if A broadcasts a search request, B receives it and broadcasts it on, and C receives it and wishes to reply with a search result, C will route that search result back to B, who in turn will route it back to A. Pongs and search results are routed on the Gnutella Network. As for "push" requests, some servents route them and others broadcast them. However, there is no good reason to broadcast push requests, and no good servent broadcasts them. Another term for broadcasting is "flooding". **(adapted from the glossary at http://limewire.com)**

Cache:

A cache is a fast storage area for speeding up access to frequently used information. Retrieval of the information is faster from the cache than the originating source. There are many types of caches in most computer systems, including a RAM (or memory) cache, a disk cache, and a web page cache, to name a few. Most web browsers utilize a cache to keep track of frequently accessed world-wide web pages. After a web page has been cached, accessing the same page again becomes faster. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

Chat:

An Internet application or protocol that allows members to type messages to one another in a common window. The effect is very similar to chatting at a party. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

Client:

1. Any computer system that requests a service of another computer system. A computer requesting the contents of a file from a file server is a client of the file server. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

2. A software program or computer that requests information from another software program or computer. For example, your web browser (e.g., Internet Explorer or Netscape Navigator) is a client which communicates with web servers to request web pages.

Client-Server Model

A network configuration in which one computer, designated as a "server," sends information and provides services to a number of other "client" computers. A different configuration for sharing information is a peer-to-peer architecture. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

GUID:

Short for Global Unique Identifier, a GUID is a randomized string that is used to uniquely identify a host or a message on the Gnutella Network. This prevents duplicate messages from being sent on the network. **(adapted from the glossary at http://limewire.com)**

GWebCache:

A network of voluntarily operated web servers that are used to help Gnutella servents bootstrap themselves. A Gnutella servent can contact a GWebCache server to request the IP address of other servents that have recently contacted it. Additionally, a Gnutella servent can register itself with the GWebCache server, so that its own IP address will be handed out to other Gnutella servents when those other servents bootstrap themselves. Finally, a Gnutella servent can upload the web address of other GWebCache servers to a GWebCache server. A GWebCache server is similar in functionality to a host cache.

Horizon:

Your horizon is the group of Gnutella servents that you are capable of communicating with at a particular time. Because of the decentralized nature and large scale of the Gnutella Network, your horizon may not encompass the entire active Gnutella Network. Also see "Time to live". **(adapted from glossary at http://limewire.com)**

Host Cache:

A host cache is a Gnutella servent whose role is to facilitate the bootstrapping process for other Gnutella servents. A host cache keeps a list of IP addresses of servents with which it has recently communicated. When a new Gnutella servent needs to bootstrap itself, it can contact a host cache to receive a list of other Gnutella servents.

IP Address:

A string of four numbers separated by periods (such as 111.22.3.144) used to represent the address of a computer on the Internet. When a computer accesses the Internet through an ISP, it is sometimes assigned a temporary IP address that is reclaimed and reassigned to another computer when the first computer disconnects itself. This process is called a dynamic **IP**. Each time a computer using dynamic IP connects with its ISP, its IP address can (and probably does) change. A permanent IP address is called static; a computer with a static IP address will always have the same IP address. An application running on a computer can be contacted at that computer's IP address; applications may also have an additional number associated with them, called a port, which allows multiple applications on the same computer to be distinguished from each other. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

Jtella:

An open-source domain implementation of the Gnutella protocol. Morpheus 2.0 incorporates the Jtella source code in its software, and relies on this Jtella source code to provide many aspects of the Gnutella file sharing functionality to users.

Message:

All information sent over the Gnutella Network is in one of five message types. A message is either a ping, a pong, a search request, a search reply, or a push request. New message types have been considered as part of potential improvements to the current Gnutella. **(adapted from the glossary at http://limewire.com)**

Network:

A set of computers linked to one another for data sharing. When you connect to an ISP or the Internet, you are connecting to a network. The Gnutella network consists of the subset of computers on the Internet that are running Gnutella servents. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

Peer:

Two computers are considered peers if they are communicating with each other and playing similar roles. For example, a desktop computer in an office might communicate with the office's mail server; however, they are not peers, since the server is playing the role of server and the desktop computer is playing the role of client. Gnutella's peer-to-peer model does not depend on permanent centralized servers; the network is composed entirely of peers. Computers connected to the Gnutella Network are also referred to as "nodes", "hosts", or "servents". **(adapted from the glossary at http://limewire.com)**

Peer-to-peer model:

A network configuration in which members, called peers, self-organize themselves into a decentralized network. All peers in a peer-to-peer network play approximately symmetric roles: each peer behaves both as a client and a server. Because there are no central servers in a pure peer-to-peer network model, the failure or forced termination of any

individual peer will not affect the functioning of the overall peer-to-peer network in any substantial way.

Ping:

When a new user joins the Gnutella Network, he broadcasts a message called a "ping request" to the network, announcing his presence on the network. Nodes which receive this ping can send a pong back to the pinging user to acknowledge that they have received this message. **(adapted from the glossary at http://limewire.com)**

Pong:

When a node on the Gnutella Network receives a ping request, it replies with a pong (also sometimes referred to as a "ping response"). This pong contains the responding host's IP address and port, as well as number of files the responding host is sharing and their total size. **(adapted from the glossary at http://limewire.com)**

Protocol:

A set of rules that governs how information is to be exchanged between computer systems. **TCP/IP** is an example of a protocol used to connect to the **Internet**. The word protocol is also used in certain structured chat rooms to refer to the order in which people may speak. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

Push Request:

When a servent is behind a firewall, other hosts are not able to connect to that servent directly to download a file. When this happens, the host trying to download the file sends a push request, asking the servent behind the firewall to connect out and upload the file to him. **(adapted from the glossary at http://limewire.com)**

Query:

See "search".

QueryHit:

See "search result".

Search:

When a servent initiates a search request, he broadcasts a search message to the Gnutella Network that contains the query string, as well as the minimum acceptable network speed specified by the servent initiating the search request. Also called a query message. **(adapted from the glossary at http://limewire.com)**

Search Result:

When a host receives a search request and is sharing files which satisfy the search criteria, it responds with a search result message. The search result message contains the IP address (including port), and speed of the servent sending the search result message, as well as a list of file sizes and names. Also called a query hit. **(adapted from the glossary at http://limewire.com)**

Servent:

A combination of a server and a client. In the old centralized file-sharing model, there were distributors of information, called servers, and requestors of information, called clients. In the decentralized gnutella model, each computer on the network is both a client and a server and is thus called a "servent." Also see "peer". **(adapted from the glossary at http://limewire.com)**

Server:

A computer that is the central point, or one of a small number of central points, for a network. There are many servers on the Internet. Files for each Internet site are stored

and executed on the server. While there are many different types of servers, they share the common job of providing clients access to files and services. Some servers only handle mail or only files, while others do more than one job. **(adapted from CSGNetwork's Online Computer, Telephony & Electronics Reference at http://www.csgnetwork.com/glossarys.html)**

Time to Live:

Abbreviated "TTL," the Time to Live is the number of hops that a message will make on the Gnutella Network before being discarded. Each servent that views a message will decrement its TTL by 1, and will discard that message when the TTL reaches 0. This prevents messages from being sent back and forth across the Gnutella Network indefinitely. Most gnutella clones set TTL at around 7, although some allow the user to configure it. **(adapted from the glossary at http://limewire.com)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))
[Filed Sept. 9, 2002]	

DECLARATION OF JANIS IAN IN SUPPORT OF DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Janis Ian, do hereby declare:

1. My name is Janis Ian. I currently reside in Nashville, Tennessee.

2. I am currently a song-writer, performer, recording artist, and author.

3. My principal profession for the past 37 years has been as a professional performer, recording artist and song-writer. My first published work was in 1963, first recording in 1964, and first record release in 1965. Since that time, I have received 9 Grammy nominations and 2 Grammy awards. I have recorded 17 albums for major record labels, as well as 3 albums for independent labels and numerous "best of" collections. My best known songs in the United States include 1967's "Society's Child," 1972's "Jesse," and 1975's "At Seventeen." More recently, my 1993 album "Breaking Silence" was nominated for a Grammy Award as Contemporary Folk Album of the Year. Songs I have written

have been recorded by a wide range of artists, including Bette Midler, Cher, Glen Campbell, Vanilla Fudge, Joan Baez and Etta James. My songs have also been featured in films and television programs.

4. During my career, I have developed considerable expertise regarding the music industry.

5. In addition to my music career, I am a regular contributor to the magazine *Performing Songwriter*. I also make these columns available on my web site (www.JanisIan.com).

6. Attached hereto as Exhibit "1" is a true and correct copy of a column entitled "The Internet Debacle," which can be found at my website (http://janisian.com/article-internet_debacle.html). A version of this column appeared in the May 2002 edition of *Performing Songwriter*. The article accurately reflects my views on how new Internet technologies, including peer-to-peer (P2P) filed sharing, can help artists in general and how they have helped my career in particular. Since its publication, the article has been translated into 9 languages and posted on over 1.000 web sites. A follow-up article entitled "Fallout" will be forthcoming in *Performing Songwriter* and is also available on my website (http://janisian.com/article-fallout.html).

7. The rise of peer-to-peer file-sharing has directly helped me as a musician. First, it has generated valuable exposure for my work. Prior to the rise of P2P technologies, my website (www.janisian.com) averaged between 60-75,000 unique visitors per year. As the P2P phenomenon took hold, the traffic to my site increased dramatically. Today, my site is attracting nearly ten times as many unique users, thanks in part to interest from those who have discovered my music on P2P networks.

8. Second, file-trading on P2P networks has helped me increase CD sales. During the peak of Napster's popularity, roughly 100 people per month sent me notes mentioning that they had found the site after downloading my songs from Napster. Of those, an average of 15 per month purchased CDs (those were the ones who specifically mentioned finding the site after obtaining a song on a P2P network). This resulted in $2700 annually that I would not otherwise have earned. While that may not count as significant for a major record label, it is a meaningful amount to an artist like myself.

9. Third, file-trading on P2P networks has allowed me to experiment with new methods of promotion. For example, in May 2002, I began offering a number of my songs for download in mp3 format from my website. I encourage unrestricted redistribution of these tracks, including on P2P networks. This has proven to be very popular with site visitors and has further increased sales of my CDs. Merchandise sales on the web site are up over 300% from the same time last year, in part because of the promotional value generated by the free tracks. In fact, during the first 60 seconds that the files were made available, 264 people attempted to download them. The tracks are currently downloaded, on average, 1,000 times each day.

10. The availability of an open P2P network, where users can redistribute my work without having to ask permission, reduces my costs tremendously and enhances the promotion value of the free mp3 tracks I make available on my web site. When individuals share these free tracks on P2P networks, they are extending the promotional reach of the track, saving me the costs of hosting the files on my web site.

11. I strongly contest the claim that record labels are fighting P2P technologies on behalf of artists. On the contrary, I believe that (with the possible exception of a

select few artists backed by millions of promotional dollars and radio airplay) P2P technology represents more of an opportunity than a threat to the vast majority of musicians. In particular, this new technology represents new opportunities for younger musicians who are not able to secure the backing of a record label, as well as for older artists whose works are now out of print and otherwise inaccessible to fans.

12. I have heard from many individuals, nearly on a daily basis, that they have discovered new music by using P2P file-sharing networks, including music from musicians from Africa, China, Japan, and the Middle East who have traditionally had difficulties securing distribution and promotion in the United States.

13. Only by preserving the availability of this technology will artists have the freedom to explore alternatives to the current major label system. That system is not currently serving the vast majority of musicians. In 37 years, 9 Grammy nominations, several hits, and 20 albums, every royalty statement I have received from my major record labels has claimed that I owed them money, rather than vice-versa. As detailed in "The Internet Debacle," the music industry's mistreatment of artists is well-documented. P2P technologies offer musicians an alternative channel for promotion and distribution.

14. I am not in favor of copyright infringement, or in favor of indiscriminate downloading of music without the artist's permission. But I am convinced that P2P software like Morpheus, Kazaa, Grokster, and other file-sharing applications have many legitimate uses that should not be sacrificed simply because the technologies may be misused by some. These technologies are already helping me, and I look forward to exploring their potential in the future.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Nashville, Tennessee, on September 6, 2002.

/s/

Janis Ian

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF GREGORY NEWBY IN SUPPORT DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Gregory Newby, hereby declare as follows:

1. My name is Gregory Newby. I reside in Efland, North Carolina.

2. I am the Volunteer CEO of the Project Gutenberg Literary Archive Foundation, a 501(c)(3) nonprofit corporation organized under the laws of Mississippi. Since 1997, I have also been an Assistant Professor with the School of Information and Library Science at the University of North Carolina Chapel Hill. Between 1991 and 1997, I served as an Assistant Professor, Graduate School of Library and Information Science, University of Illinois at Urbana-Champaign. Prior to that, I was an instructor and adjunct faculty member at Syracuse University in Syracuse, New York. I have published dozens of articles and taught numerous courses on information sciences and Internet issues. I received a Ph.D. in Information Transfer from Syracuse University in 1993, an M.A. in Communications from SUNY Albany in 1988, and a B.A. in Communications and Psychology from SUNY Albany in 1987. My complete

vitae can be found at hup://www.ils.unc.edu/gbnewby/vita.html.

3. Project Gutenberg is the oldest information provider on the Internet, having been founded by Michael S. Hart in 1971. Although the "Internet" at the time included only a few computers tied together in a system known as ARPANet, it was clear to Project Gutenberg even then that anything that can be entered into a computer can be reproduced indefinitely. By making use of this principle, it became clear that everyone in the world, or even not in this world (given satellite transmission), could have a copy of every book that has ever been entered into a computer. In order to make this dream a reality, Project Gutenberg was founded to begin entering public domain works into computers and make them easily available to the public and to charge nothing for the eBooks.

4. It is the aim of Project Gutenberg to make information, books and other materials available free of charge to the general public in a general form that the vast majority of computers, programs and people can easily read, use, quote, and search. This is an important difference from the various other eBook projects around the world, which use markup languages that limit users to certain reading and searching programs. In 1971, Mr. Hart began this project by typing the U.S. Declaration of Independence into a computer at the University of Illinois Material Research Laboratory and making it available to other computer users. Since then, an international group of volunteers has been entering public domain works of light literature, heavy literature, reference and scientific materials into computers and making them available to the general public via the Net.

5. Today, Project Gutenberg has coordinated the efforts of thousands of volunteers world-wide. These volunteers enter public domain works into computers, format these

works as simple eBooks so that they can be used by the widest variety of computers, including the new "Palm Powered" PDAs, and make these eBooks available to the general public over the Internet through various servers located around the world on every continent. These arc all operated by volunteers on their own time and expense.

6. Since its inception in 1971, Project Gutenberg has made over 5,600 eBooks available. I expect that number will grow to over 6,000 by the end of 2002. The vast majority of these are works in the public domain and we license the remainder from the copyright owners for Project Gutenberg distribution as eBooks. Thanks to the work of Project Gutenberg volunteers, we published over 1,350 eBooks in the first seven months of 2002 and anticipate surpassing 2,500 new eBooks by the end of 2002.

7. A current listing of Project Gutenberg eBooks is attached as Exhibit A. The list can also is found at the Project Gutenberg home page (http://promo.net/pg/titles.zip). The following is a representative sample of the public domain works made available as eBooks through the efforts of Project Gutenberg:

a. All major works of William Shakespeare, in multiple editions, and including apocrypha;

b. The King James Bible (New and Old Testament), in multiple editions, and including apocrypha;

c. The Koran;

d. Herman Melville, Moby Dick in two separate editions, and Typee, Omoo: Adventures in the South Seas, etc.;

e. Thomas Paine, The Rights Of Man;

f. The Federalist Papers;

g. NAFTA treaty text, annexes and tariffs;

h. Jane Austen, Persuasion, Pride and Prejudice, Sense and Sensibility, Love and Friendship, etc.;

i. Upton Sinclair, The Jungle, The Machine, The Profits of Religion, etc.;

j. Johann Wolfgang von Goethe, Italienische Reise, Faust, The Sorrows of Young Werther, etc.;

k. The first 100.000 prime numbers, and other numbers of particular scientific interest to a million places;

l. Central Intelligence Agency, The World Fact Books from 1990 to the present;

m. Caesar's Commentaries (in Latin);

n. Adam Smith, Wealth of Nations;

o. The Human Genome Project, ATCG codes, two editions;

p. Theodore Roosevelt, An Autobiography by T.R.;

q. Karl Marx & Friedrich Engels, The Communist Manifesto;

r. Louisa May Alcott, Little Women, Little Men, Jo's Boys, etc.;

s. John Milton, Aeropagitica;

t. F. Scott Fitzgerald, This Side of Paradise;

u. Alexis de Toqueville, Democracy In America;

v. The Complete Plays of Gilbert and Sullivan;

w. Popular Science Monthly, Oct, Nov, Dec, 1915 V.86;

x. Dante Alighieri, The Divine Comedy (in the original Italian, as well as the Longfellow, Cary and Norton translations);

y. Ulysses S. Grant, Personal Memoirs;

z. Charles Darwin, On the Origin of Species;

aa. Plato: Symposium, Meno, Phaedrus, Ion, Euthyphro, Cratylus, Euthydemus, Protagoras, Laches, Charmides, Lysis, etc. (Jowett translations);

bb. Immanuel Kant, The Critique of Pure Reason;

cc. Collected Inaugural Speeches of the United States Presidents;

In addition to the eBooks made available by Project Gutenberg, thousands more eBooks of public domain works have been created and distributed by other groups. The goal of the Gutenberg Project has bean stated as: "to post 10,000 electronic books, or eBooks, on the Internet by the end of 2001." The Internet Public Library listed The Notebooks of Leonardo da Vinci as their 20,000th the listed eBook, which Project Gutenberg released as their 5,000th eBook on April 10, 2002.

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can have free, convenient access to a vast library of public domain works. The average new computer today costs under $700, and 100 gigabyte drives are between $100 and $200 depending the brand and place of purchase. With gigabytes approaching $1 each, that means the entire Project Gutenberg collection wouldn't cost even $10 to store, and perhaps another $10 to make backups on a CD writer. By the end of 2002 you should be able to put 5,000 Project Gutenberg eBooks on one of these new computers by using up just $10 of your drive space.

9. In an effort to ensure that Project Gutenberg eBooks can be read by the widest variety of computers, they are made available in what has become known as "Plain Vanilla ASCII," meaning that nearly all of our eBooks are available in various other formats including HTML and provide dozens of different languages which sometimes require different character sets than ASCII. Our collection also includes several audio files (including audio books and music) and a few short movies.

10. Although eBooks are distributed by Project Gutenberg from computers that use file transfer protocol (FTP/HTTP servers), eBook files are suitable for distribution through many computer file-sharing technologies. For example, eBooks may be sent as email attachments. Others have reformatted eBooks in numerous formats including LaTeX, PDF, PostScript, eBook formats, HTML, XML, and a variety of other formats, and made them available on the World Wide Web. The Project Gutenberg 'small print' license, included with each eBook, specifically encourages this reformatting and redistribution.

11. Any technology that makes it easier and cheaper for individuals to redistribute eBooks over the Internet helps achieve Project Gutenberg's goals of making public domain information freely available to the general public.

12. With zero labor and material costs, P2P file-sharing technologies promise to be the ultimate public resource for wide-spread dissemination of public domain and authorized eBooks. Numerous authorized and public domain Project Gutenberg eBooks are made available on Morpheus, Kazaa, Gnutella, Grokster, and similar software products. This sharing is a great advantage to both Project Gutenberg and the public since the public domain eBooks can be disseminated without adding any additional costs to the Project or to the public. Project Gutenberg welcomes this widespread sharing of public domain eBooks using these software products since they assist us in meeting our objectives, while providing a tremendous public benefit by spreading knowledge and culture to those who might not have access to the public domain eBooks through more traditional means.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in Elfland, North Carolina on August 27, 2002.

/s/

Dr. Gregory B. Newby

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))
[Filed Sept. 9, 2002]	

DECLARATION OF BREWSTER KAHLE IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Brewster Kahle, hereby declare:

1. My name is Brewster Kahle. I reside in San Francisco, California.

2. I am a founder and a member of the board of directors of the Internet Archive (the "Archive"), which I founded in 1996. I also held the position of the co-founder, President, CEO, and Chairman of the Board of Alexa Internet, now a wholly-owned subsidiary of Amazon.com. Alexa is a leading provider of Internet navigation and search services. I am also a member of the Board of the Electronic Frontier Foundation.

3. Before founding the Internet Archive, I invented the WAIS (Wide Area Information Server) system and, in 1992, founded WAIS Inc., an electronic publishing company. Before that, I served as senior engineer for Thinking Machines, a parallel supercomputer maker, between 1983 and 1989. I earned a B.S. from M.I.T. in 1982.

4. The Archive is a 501(c)(3) public nonprofit that was founded to build an "Internet library" with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format. The Archive currently maintains the largest collection of text in the world, and these collections are publicly available through the Internet. Physically located in the Presidio of San Francisco, California, the Archive receives data and financial donations from a multitude of resources, including libraries, educational institutions, and private companies.

5. While the importance of the public domain is widely recognized, providing universal public access to this vast cultural resource has, as a practical matter, been difficult. Publishers have been unwilling to keep public domain works in publication. For example, of the 13,470 books published in the United States in 1910, today only 180 titles are available for purchase from any publisher worldwide. The same is true for many of the films of the silent era. Libraries and archives, for their part, have been hampered by limited geographic reach and the costs of acquisition, preservation and storage of physical materials.

6. By harnessing digital technology, however, it has become possible to make the full range of public domain information and knowledge freely and universally available. Recognizing this, governments, libraries, and private corporations around the world have embarked on projects to digitize public domain works.

7. One of the primary aims of the Archive is to harness the unique power of the Internet to make our cultural heritage freely accessible to all. For example, the Archive recently digitized 1,001 important public domain archival films from the collection of the Prelinger Archives. These films are now available at no charge for download on the Internet at http://www.archive.org/movies.

8. During late 2001, the Prelinger films were downloaded from archive.org over one hundred thousand times. In contrast, during the entirety of the year 2000, only 2,000 or so of the Prelinger Archives' collection of 48,000 films were accessed by the public through purchases of stock footage. During that same year, only 200 physical visits to the archives occurred.

9. Digital archiving and distribution of public domain films is particularly valuable at a time when digital technologies are putting new tools of expression into the hands of an unprecedented number of people. For example, today every Apple iMac computer comes bundled with iMovie software that permits individuals to manipulate and edit video footage, including the Prelinger films offered by the Archive.

10. In order to highlight some of these new possibilities, the Archive recently sponsored a filmmaking contest. It asked amateur filmmakers around the world to create a short film showing a perspective on an historical event associated with war. Entrants were asked to limit their resources to public domain content found in archives around the Internet, including the Prelinger films offered by the Archive. Submissions came from around the world, including from a high school class in the District of Columbia and an individual in Sweden. All the submissions, including the winning entry, can be found at http://ftp.archive.org/html/contest01/gallery.htm. This kind of new use and reuse of public domain content depends upon free public access to public domain film archives.

11. Unfortunately, while the Internet today has great promise as a low-cost, global distribution mechanism, it still leaves much to be desired for digital libraries like the Archive. Currently most media on the Internet is delivered from centralized servers that either permit individuals to

make a copy of a file via download or to access the file in near-real-time via streaming. Each approach requires that the Archive bear the costs associated with data storage and bandwidth.

12. With respect to bandwidth costs, in particular, there is the additional cost penalty that comes with popularity. Where a central server is used, the more popular a work is, the more bandwidth expense will be associated with making it available. To take one example, when network traffic to the Archive servers exceeded the bandwidth we had anticipated, the result was a very large "overage" bill from our Internet service provider. This creates perverse incentives, as libraries and archives who would otherwise be eager to make available the most popular public domain works may find themselves hampered by the "popularity penalty."

13. Centralized server solutions have other limitations, as well. For example, efforts to make information globally available from a central server often face the realities of network congestion and capacity limits on trans-national telecommunications conduits. As a result, it is far more effective to distribute copies of files to a global network of servers, maximizing the chances that a requesting party will be able to access a work from a local server. Companies like Akamai Technologies provide this service to the corporate sector, but at a high cost that cannot be supported by free archives.

14. Peer-to-peer file sharing technologies, like those offered by the Morpheus, Grokster and KaZaA software, overcome many of the limitations of centralized download and streaming technologies and constitute a valuable advance in technology for those seeking to provide universal access to public domain material.

15. For example, in a peer-to-peer file sharing network, bandwidth and storage costs are shouldered by the community of users rather than the Archive. This is especially crucial where largo multimedia files are concerned, such as the Prelinger films.

16. Peer-to-peer file sharing technologies also can function as a "public Akamai." As a file is downloaded and shared within a peer-to-peer file sharing network, it spreads to locations around the world, thus offering the same sort of global network infrastructure offered by companies like Akamai. Because this global redundancy is a natural outgrowth of peer-to-peer networks, however, this feature is provided at no cost to the originating library or archive.

17. Finally, peer-to-peer file sharing technologies also offer a solution to the perverse incentives that arise from the "popularity penalty" discussed above. In a peer-to-peer network, the more popular a work is, the more users will be sharing it. This, in turn, will lower the bandwidth costs to the originating library because the content will be accessible from other members of the peer-to-peer community. These benefits arise organically, without the need for any central administration or expense on the part of the archive or library.

18. There is a striking elegance to the fact that, in a peer-to-peer file sharing network, the costs of providing access to public domain resources is borne by the community of users themselves. Archives and libraries can thus devote a greater share of their resources to digitizing and preserving public domain works, rather than to expenses associated with access and distribution.

19. For these reasons, the Archive has been actively exploring the use of peer-to-peer file sharing technologies. For example, the Archive made the Prelinger files available through a peer-to-peer file sharing network using technology

developed by a company called Flycode. While the results were promising, the company failed before many people used that system.

20. The Prelinger films are well-suited to distribution through the community of Morpheus-Grokster-KaZaA users. Those who download the Prelinger films from archive.org are entitled to redistribute those files, and the Archive welcomes their redistribution by the Morpheus-Grokster-KaZaa community of users.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in San Francisco, California on September 5, 2002.

/s/

Brewster Kahle

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF RICHARD PRELINGER IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Richard Prelinger, hereby declare:

1. My name is Richard Prelinger. I reside in San Francisco, California.

2. I am currently founder and president of Prelinger Associates, Inc., known in the trade as Prelinger Archives, which I founded in 1985. Prelinger Archives is a for-profit archive of historical moving images that furnishes stock footage to the media production community through Getty Images, Inc., its exclusive representative.

3. I served on the Board of Directors of the Association of Moving Image Archivists (AMIA), a professional organization, between 1993 and 1997, and am currently AMIA's representative on the National Film Preservation Board, as appointed by the Librarian of Congress.

4. Before founding Prelinger Archives, I worked as a researcher and archival consultant on motion pictures and television programs. Between 1989 and 1995, I was Director

of Archival Development at The Comedy Channel and Home Box Office, both in New York City. In 1989, my company published *Footage 89: North American Film and Video* Sources, the definitive compendium of public and private moving image collections. I attended the University of California at Berkeley, completing four years of classwork in 1979.

5. Prelinger Archives has assembled and owns a collection of over 48,000 "ephemeral" (advertising, educational, industrial, documentary and amateur) films produced between 1903 and 1990. Approximately 60% of this material is in the public domain; we own rights to approximately 5%; and the remainder, currently under copyright, is available for on-site reference use only. We are known in the industry for both breadth of imagery and high image quality, and for our exclusive coverage of many aspects of American cultural and social history.

6. Prelinger Archives is a commercial, for-profit venture. The market for our stock images and sounds is wide and continues to broaden as the number of media outlets increases. We license footage to motion picture producers both in and out of Hollywood; broadcast and cable television networks and production companies; software developers and publishers; educational media producers; corporate video producers for both in-house and external use; to advertising agencies for commercials, print advertisements and presentations; to concert promoters and theatrical promoters for use in conjunction with their events and productions; to government agencies at every level; to artists and nonprofit organizations for a wide variety of projects; and clients in many other market areas.

7. Historically, collectors or custodians of public domain materials have exercised a high degree of physical

and contractual control over the material in their possession. This custom has caused problems because it leads to a monopoly and exclusivity of imagery. Though we shared this controlling perspective out of concern for wide-spread unauthorized copying when we began in business, we quickly found to be short-sighted.

8. In 1987, we partnered with The Voyager Company, a pioneer publisher of videodiscs and CD-ROMs, to publish two one-hour anthologies of key ephemeral films from our collection. Though the first two compilations sold only some 20,000 copies, they proved influential in building our reputation as a source for unique and evocative historical imagery within the production community, and, though we had not anticipated that they would so function, ended up serving as excellent "demo reels" of our holdings, bringing us new business (as well as national publicity on every major television network).

9. In 1994, we began production on an expanded anthology of 12 CD-ROMs, 10 of which were published, that contained a substantial number of historical films from our collection together with contextual material. This anthology also brought us a good deal of press attention and new business. It is important to note that we did not prohibit users of this second anthology from copying the movies and using them for their own purposes.

10. Our experience with these digital anthologies convinced us that widespread distribution of our films, along with the resultant publicity, built our "brand" in the area of archival footage. Our willingness to distribute freely in digital formats also served to differentiate us from the growing pool of other companies specializing in this area.

11. As a result of our early experiences with digital distribution, in 2001 Prelinger Archives arranged to have 1,001 of our most popular public domain films digitized and made available through the Internet Archives at www.moviearchive.org. In an effort to maximize the commercial value of this wide distribution, further reuse and redistribution of the digitized films (whether by the community of peer-to-peer software users or otherwise) was left unrestricted.

12. Our partnership with the Internet Archive has addressed many business issues for us in a promising way.

13. First, by building the largest publicly available archival film collection on the Web, we have accomplished an enviable goal - the capability of providing demo reels to anyone, anywhere, at no cost to ourselves. When a prospective client requests a copy of a given film or image, it is usually already available online for free. This means that our active involvement with the transaction begins after the choice has been made, and we don't have to pass through the laborious research stage.

14. Second, free distribution through the Internet Archive, and from there, further redistribution through other sources, has increased brand visibility for Prelinger Archives.

15. Third, since the images in the Internet Archive are freely downloadable, they can be used more readily than images in other collections. In the stock image business, ubiquity equals sales. Some years ago, the director of the Time-Life Photo Collection told me that the most used, yet also most remunerative image in her collection was the famous photograph of the 3-D film audience, all seated wearing stereoscopic glasses. This picture has been reproduced so often as to become a cliché, but this has

actually increased sales. From our perspective, frequent use of our images increases the frequency of demand for them.

16. Fourth, we can now refer worthy but financially-challenged users to the website, where they can get material for free without ourselves having to incur any costs. We still gain from the publicity they generate for us, and the visibility of the images they use benefits us.

17. Peer-to-peer networks represent a very exciting opportunity, as they will propagate images even more widely without increasing our costs. As discussed above, Prelinger Archives believes that widespread, unrestricted digital distribution of our films brings important commercial benefits. As a result, we welcome further redistribution of the Prelinger films made available at the Internet Archive by individuals using peer-to-peer software products like Morpheus, KaZaA and Grokster.

18. By voluntarily "hosting" our films and making them available to the millions of others in the peer-to-peer community, the users of these peer-to-peer software products are amplifying the availability of the Prelinger films, extending our reach beyond that of the Internet Archive alone. To the extent this is done without imposing any additional costs on Prelinger Archives, whether in the form of hosting or bandwidth charges, this is great for us.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in San Francisco, California on August 27, 2002.

/s/
Richard Prelinger

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))
[Filed Sept. 9, 2002]	

DECLARATION OF ARAM SINNREICH IN SUPPORT OF GROKSTER, LTD.'S MOTION FOR SUMMARY JUDGMENT

I, Aram Sinnreich, declare as follows:

I. BACKGROUND AND QUALIFICATIONS

1. I have been retained as an expert witness by counsel for Defendant Grokster, Ltd. ("Grokster"), to provide expert testimony on behalf of Grokster and Defendant Streamcast Networks. I am a writer, speaker and analyst covering the media and entertainment industries, with a special focus on music. I was recently named one of the fifteen "Innovators and Influencers of 2001" by InformationWeek. I am often quoted in media outlets such as The New York Times, Forbes, Billboard, The Wall Street Journal and NPR. I have appeared on ABC World News Tonight, The CBS Early Show with Bryant Gumbel, CNN, CNBC, BBC Radio and Fuji TV. Recently, I was a featured presenter at the 2002 NARM conference in San Francisco and keynoted Day 1 of Jupiter Media's Plug.In music conference in New York. I have also addressed several university audiences and professional organizations, including NYU's Graduate Music Business Program, Fordham University's MBA Program, and The New York State Bar Association.

2. I have written about music and the music industry for publications including The New York Times, Billboard, and World Radio. As a Senior Analyst at Jupiter Research in New York for over five years (1997-2002), I produced prize-winning research reports covering the online music and media industries and provided hands-on strategic consulting to companies ranging from AOL Time Warner to Microsoft.

3. I also write and perform music, as bassist for groups including seminal ska-punk band Agent 99 (Shanachie Records) and dancehall reggae queen Ari Up (former lead singer of The Slits), and as a co-founder of New York soul group Brave New Girl and jazz band MK4. Two of the songs I composed for Brave New Girl have been licensed to MTV's animated series, Daria. I earned my B.A. in English at Wesleyan University and received an M.S. in Journalism at Columbia University. I am currently enrolled as a doctoral candidate in Communication with an emphasis on music industry dynamics at the University of Southern California's Annenberg School of Communications in Los Angeles.

II. The Numbers: Market Effects of File Sharing, Thus Far, Are Net Positive

4. Much of the press surrounding file sharing, and all of the public statements by the entertainment industry, have begun with the premise that file sharing is intrinsically detrimental to the sales of music, movies and other packaged entertainment. Moreover, analyses of intellectual property "losses" stemming from file sharing have based their numerical claims on the formula:

(number infringements) x (retail value of infringed works) = opportunity cost.

5. My research has shown that both these assumptions are false. To the first point, it is true that file sharing has a negative impact on purchasing among some consumers, but it actually has a positive effect on a greater number. To the

second point, file sharing inspires many music fans to download music they never would have bought anyway: songs they have a marginal or temporary interest in, songs that are only available on full-length albums along with fifteen unwanted tracks, and, most importantly, songs they are considering for future purchase. Also, if a retail value were assigned to every copyrighted work that is shared in a given year, the "opportunity cost" would dwarf the actual aggregate market value for that product. That is to say, by the assumptions above, more than $14 billion worth of copyrighted music is shared online each year.

6. For whatever reasons, file sharing seems to have a net positive impact on music sales (and, given the technical difficulties and time commitments involved, I would judge that it has a negligible impact, positive or negative, on movie sales and ticketing). I reached this conclusion after fielding research surveys including thousands of online adults, in both 2000 and 2001.

7. My methodologies were similar for both the 2000 and 2001 studies. In brief, I asked consumers at one point in the survey whether their music purchasing levels had increased, decreased, or remained constant during the years they had been online. At a different and unrelated point in the survey, I asked them about their experience with various online behaviors, including file sharing. In both years, I discovered a marked statistical correlation between file sharing and increased music purchasing. Furthermore, file sharing tenure had an important impact, as well. The longer a consumer had been sharing files, the more likely he was to say that his music purchasing had increased over the past few years. Lastly, when I surveyed online music consumers about their receptivity to paying for an online music subscription service (such as Pressplay or Rhapsody), high file sharing tenure was the greatest statistical predictor of willingness to pay. In other words, file sharers are a very receptive market, especially for digital music services. Further information on this research

can be found in the Jupiter Research Reports:

Digital Music Subscriptions: Post-Napster Product Formats (2000)

Music Consumer Survey Report (2001)

File Sharing: To Preserve Music Market Value, Look Beyond Easy Scapegoats (2002)

III. Artist Support for Online Music Sharing

8. Music industry trade organizations such as the RIAA and NARAS have come out staunchly against file sharing, claiming that the technology deprives artists and songwriters of fair compensation. However, a number of high-profile artists (and countless lesser-known musicians) have found positive business benefit in file sharing – primarily from its marketing potential. Below are three case studies, involving the artists Wilco, Janis Ian and Tom Petty.

A. Case Study: Wilco

9. Wilco, a modestly successful alt-country band on AOL Time Warner's Reprise label, produced its fourth album for the label, dubbed "Yankee Hotel Foxtrot," (YHF) last year. Reprise, which has just undergone a management shake-up that deprived the band of its chief supporter at the company, considered the record a potential commercial disaster, and refused to release it. The band exercised a clause in their contract that allowed them to be released from their relationship with the label. In August 2001, they bought the masters back from Reprise for $50,000 – less than it cost them to make it – and went looking for another label to release it.

10. In the meantime, public interest in YHF was growing. In September, the band made all of YHF available in digital format on its website, prompting 200,000 unique visitors that month alone. Almost instantly, the entire album was available for download on all the free file-sharing

networks, where it remains to this day.

11. The band thereafter signed with Nonesuch Records, another AOL Time Warner-owned label, and released YHF this April. The album debuted on the Billboard charts at #13 with domestic sales of 56,000 for the week – by far their best debut ever. The album has continued to perform well, outselling all of their albums on Reprise. It has now sold over 300,000 copies in the U.S.

12. The week the album launched, a note on the Wilco website (run by the band) read: "Thanks to everyone for helping us to prove that trusting your fans and letting people hear music over the internet for free is not a bad thing."

13. This lesson has already been adopted by artists still signed to their major labels. Recently, British pop band Coldplay previewed each track from its new album, "A Rush of Blood to the Head," for free online in advance of the album's August 26th release. The album recently entered the Billboard charts at number five in the "Hot 200" in its first week of release (charts dated Sept. 14) – higher than any other new release of the week. Similarly, Lava/Atlantic bands A Simple Plan and Grade 8 are currently offering free downloads of songs from their current albums via GigAmerica and Grokster.

B. Case Study: Janis Ian

14. While much of the copyrighted music available on file sharing networks is the stuff of Top Ten lists – Britney Spears, Eminem, etc. – file sharing has also provided a valuable marketing outlet for "back catalog" and more moderately successful artists. One example is Janis Ian, the singer/songwriter best known for her 1975 hit "At Seventeen."

15. Ian sparked industry-wide debate earlier this year by publishing a series of articles asserting that online music, including free file sharing, has a positive impact on sales for

artists such as herself. These artists are unlikely to get much radio play or marketing or promotional help from labels, and unless their music is included in move soundtracks, they are often forgotten by music buyers too young to have heard them in their heyday.

16. As Ian wrote, the word-of-mouth promotion available online actually provides a steady stream of sales she would not otherwise have made. In her words:

> Let's take it from my personal experience. My site (www.janisian.com) gets an average of 75,000 hits a year. Not bad for someone whose last hit record was in 1975. When Napster was running full-tilt, we received about 100 hits a month from people who'd downloaded Society's Child or At Seventeen for free, then decided they wanted more information. Of those 100 people (and these are only the ones who let us know how they'd found the site), 15 bought CDs. Not huge sales, right? No record company is interested in 180 extra sales a year. But... that translates into $2700, which is a lot of money in my book. And that doesn't include the ones who bought the CDs in stores, or who came to my shows.

17. Janis Ian is hardly unique in this respect. The artist community is split strongly and evenly between pro-P2P and anti-P2P factions. I have personally heard identical arguments and similar anecdotes from artists and songwriters at several industry conferences, such as SXSW and The Future of Music, as well as at meetings of industry trade organizations such as NARAS (which is officially anti-P2P, though its members often differ from the party line).

C. Case Study: Tom Petty

18. In March of 1999, Tom Petty was slated to release a new album called "Echo." His management, concerned that his record label (Warner Bros.) was skeptical about the

album's success and therefore would not devote sufficient marketing power to it, independently contracted with MP3.com to place a free single ("Free Girl Now") from the new album on the then-popular download site.

19. Warner Bros. was publicly[1] furious, demanding that the song be removed from the site immediately. However, before the song was removed, it was downloaded by an estimated 150,000 users. The album went on to outperform all expectations when it was released for sale in the stores.

20. A year later, Warner Bros. released a greatest hits record for Tom Petty. This time around, a new single from the record, called "Surrender," was placed on MP3.com for free download with the label's enthusiastic blessing.

IV. Music Sharing Networks: Non-Infringing Uses and Business Benefits

21. While my research indicates that even copyright-infringing behavior on music sharing networks has a salutary effect on music purchasing, and many high-profile artists agree with this assessment, other researchers and artists would disagree with this premise. However, few would dispute that there are also a number of less ambiguously positive aspects of online music sharing. A few such aspects include:

- A number of companies have established secure, for-pay file sharing networks that reimburse rights-holders for uses of copyrighted material.

[1] Although Warner Bros. disappropved publicly, a rumor circulated around music industry circles concerning Warner Bros' negative reaction to the posting of "Free Girl Now" on MP3.com. As the rumor went, Warner Bros. was publicly furious, but privately intrigued by the number of downloads the deal prompted. Supposedly, what they told Petty's management was closer to: "Take the song down, but don't take it down quite yet."

- Some companies have used the existing free file sharing networks as platforms for commercial products and services with demonstrable business benefits.

- Many users of free file sharing networks trade non-infringing works, such as songs by local bands trying to build broader fan bases.

Below are a few examples of the trends described above.

A. Legal Music Swapping Networks

1. Scour.com

22. Scour.com is owned by CenterSpan, and is used as a showcase for the company's C-StarOne secure file sharing and media distribution platform. The site offers a secure peer-to-peer network populated with music licensed by labels and publishers. In addition to serving as a proof-of-concept execution of the C-StarOne platform, Scour's network is also used to market music. Earlier this year, the company made a deal with Sony Music to promotionally distribute music from a number of its top artists, including John Mayer and Macy Gray.

2. Altnet (www.altnet.com)

23. Altnet is a joint venture owned by Brilliant Digital and the Dutch company responsible for creating the FastTrack code, which powers KaZaA and Grokster, and used to power Morpheus. Altnet "piggybacks" on installations of Kazaa, offering users of that service the opportunity to upgrade from the low-quality, free network to a higher-quality, for-pay network. Altnet obtains licenses for all the music available on its network and compensates rights holders accordingly.

3. Inoize (www.inoize.com)

24. iNoize is a web-based application and music service

that allows users to share music without infringing on the copyrights of music companies or their recording artists by using a stream rather than actually creating a copy of the copyrighted material. The company is in talks with the music industry to develop an e-commerce system that will benefit all parties involved by providing users with on-demand music, while providing music companies with a new venue for showcasing their music and offering the ability to collect and distribute payment.

B. Free P2P As Platform for Commercial Enterprises

1. BigChampagne (www.bigchampagne.com)

25. BigChampagne is a research firm based in Los Angeles that has tapped into the enormous marketing and research potential of the free peer-to-peer networks. The company's basic premise is that free file sharing sites like Kazaa and Grokster are veritable treasure troves of market information because of the sheer number of music fans collected "in one place." The company uses proprietary software to figure out how many people are on these networks, and what they're sharing, then generates data-driven reports tracking the rise and fall in popularity of various files.

2. Jive Media (www.jiveplayer.com)

26. Jive Media is a Toronto-based technology company that has developed a secure, proprietary format for audio and video content online that emulates the television experience. The company licenses material from major content providers such as Priority Records and Koch Entertainment and then distributes the secure files through deals with free file sharing networks and software providers such as Gnutella, BearShare, Shareaza, Morpheus, Hotline, and Grokster. This year, the company was declared "Most Promising New Company of the Year" at the Canadian New Media Awards.

3. Spoofing

27. The open nature of peer-to-peer networks is both a strength and a weakness. Absence of a centralized, governing force makes it easy for people to deal in illicit wares. However, it also makes quality control virtually impossible. In other words, a user of a music swapping network faces all the risks and rewards of any "gray market" environment. A number of copyright holders and marketers have taken advantage of this fact to engage in "spoofing" – the deliberate seeding of music swapping communities with false files that appear to be full-length songs at first glance, but turn out to be something else entirely when they are downloaded to the user's hard drive.

28. Some individuals engage in spoofing to spread viruses and other malicious content, but spoofed files are also used by rights holders and their representatives as bait to catch the attention of music fans. A music fan who downloads a file he thinks is the latest Moby single will be disappointed to find out it isn't – but he may be intrigued when the file opens an advertisement on his desktop prompting him to buy the CD or to join a for-pay digital music service. Other spoofed files may give the user up to 30 seconds of untainted music before turning into an advertisement or admonishment.

29. A number of companies have developed around the concept that spoofing has considerable marketing potential. Barb Wire Networks and Overpeer (www.overpeer.com) are two companies that are currently courting record labels and other rights holders for commercial spoofing, while the Cuckoo's Egg Project (www.hand-2-mouth.com/cuckooegg) is an example of a non-commercial application of the technology.

C. Sharing of Non-Infringing Works

30. By no means all of the files shared by Grokster or

Morpheus users are copyrighted works being traded without the owner's consent. Since the dawn of Napster, peer-to-peer communities have also included a considerable number of non-infringing files, ranging from local and unsigned bands seeking exposure to amateur pornography (not exactly a noble pursuit, but certainly a legal one). Often, analyses of traffic on p2p networks mistakenly overlook this fact and assume that all shared content is in violation of copyright. For a discussion of this fact in the press, see "Piracy and free software not always counted," by Nathan Cochrane, TheAge.com, July 23 2002 (attached hereto as Exhibit A). Much of that filesharing is on an individual basis, but there are also many examples of large-scale, organized distribution of authorized content via p2p networks. In addition to the examples cited above, these include:

1. Further Network (www.furthurnet.com)

31. The Furthur Network is a non-commercial, open-source, peer-to-peer network of legal live music. The software itself is currently in beta development, available to download and is being developed and supported by volunteers and members of the etree.org and sugarmegs.org music sharing communities. Per the wishes of the artists that sanction free trading of their content on the network, the service does not pay its software or website developers, nor does it accept any advertising or compensation. The service takes its cue from the tradition among "jam-bands"— first publicly acknowledged by the Grateful Dead – of allowing fans to make and share live concert recordings, provided that there is no commercial gain. In addition to the Grateful Dead, Further Network contains live concert footage from such artists as Phish, Allman Brothers Band, String Cheese Incident, Widespread Panic, Phil Lesh and Friends, and Dave Matthews Band.

2. Project Gutenberg (http://promo.net/pg)

32. Project Gutenberg is a 30-year-old electronic library

that stores ASCII (plain text) versions of thousands of public domain documents, from the works of Shakespeare to the Declaration of Independence. The Project Gutenberg philosophy is to make public domain information, books and other materials available to the general public in forms a vast majority of the computers, programs and people can easily read, use, quote, and search. This means no proprietary formats, no membership requirements, and no security technology. Project Gutenberg also actively encourages users to share its content on file sharing networks – its entire conceptual foundation is the dictum that "information wants to be free," and to that end, it sees computer networks of any kind as a powerful tool to promote literacy and education. Such works as the King James Bible, the Koran, The CIA World Fact Book, The Time Machine, The Adventures of Tom Sawyer, The Complete mechanism of William Shakespeare, The Hacker's Dictionary, Sense and Sensibility, Dante's Inferno, The Analysis of Mind, the U.S. Constitution, and countless others are readily available on the FastTrack network.

3. Trymedia Systems

33. Trymedia Systems uses the FastTrack and Gnutella p2p networks in order to distribute authorized "try-before-you-buy" videogames from publishers such as Ubi Soft, Infogames, Digital Fusion, and 3D Groove. The trial version games can be converted to full-feature versions upon payment, but revert to trial versions when passed on to subsequent users. Trymedia reports that, to date, over 5 million legitimate copies of their games have been distributed in this manner.

4. Shareware and Freeware

34. There is a large and growing body of computer software that is distributed to the public for free, either because the copyright holder affirmatively wishes to give his or her code away, or because distribution of free versions of a

program is used to encourage later purchase of a full-featured version. Examples of the former include the various flavors of the Linux operating system, and a whole suite of free applications based on that program. Examples of the latter include the immensely popular WinZip file compression software, and the advertising-supported version of the Eudora email program, AOL's WinAmp MP3 player, and scores of other programs. And of course the Kazaa, Morpheus, and Grokster applications are themselves distributed for free. All of this software is available via the p2p applications at issue in this lawsuit.

D. Peer-to-Peer Technology as Productivity Tool

35. A number of companies in recent years have seized on peer-to-peer technology as a potential means to lower the cost of doing business and to increase the availability and flexibility of media in a closed network. A short list of such companies is provided below:

1. Kontiki (www.kontiki.com)

36. Kontiki is a California company run by former Netscape executive Mike Homer. The company offers software called the Kontiki Delivery Management System, which allows members of a client company to share files such as presentations and sales materials freely (eliminating the need for an expensive centralized server), while also allowing administrators to assign rules (such as limiting access to content) to those files. The software debuted in April 2002. The company's client list already includes TiVo, VeriSign, Nextel Communications and Palm.

2. Yaga (www.yaga.com)

37. Founded by digital media and Internet technology veterans Chris Kitze and Vijay Vaidyanathan in September 2000, Yaga offers a suite of technologies that allow companies to securely publish media and sell goods and services securely across a number of platforms, including the

internet. Integrated into the content delivery system is a micropayment tool that allows companies to charge incrementally for their content without using credit cards. The company offers a technology called Yaga AutoShare, which uses a secure peer-to-peer network for media delivery. This can drastically cut down the costs of operating a server and purchasing bulk bandwidth. The company has already processed more than 50 million transactions and more than 11 million accounts.

3. Blue Falcon (www.bluefalcon.com)

38. Blue Falcon is run by Joshua Goldman, the former CEO of meta-shopping site MySimon.com. The company offers similar technology to Kontiki and Yaga, and addresses both of their markets: corporations wishing to manage and deliver internal media, and companies wishing to deliver and sell media to consumers on a variety of technology platforms. Like the other companies mentioned, Blue Falcon pairs Digital Rights Management (DRM) software with a peer-to-peer delivery architecture to offer a secure, low cost means of delivering digital content.

4. Groove Networks (www.groove.net)

39. Founded by veteran software designer and PC Magazine's 1995 "Person of the Year" Ray Ozzie, Groove Networks offers secure peer-to-peer environments for a variety of applications. Its technology can be used, like that of the above companies, for internal media and document management within large organizations, but it is also positioned as a tool for artists, scholars, students to create their own private file sharing networks. The company works with an open architecture, encouraging third parties to develop new and innovative uses for the technology. Customers come from a wide range of sectors, including consulting, education, finance, manufacturing, non-profit, health & pharmaceutical, and technology.

40. This is only a small sampling of the companies that use peer-to-peer technology for positive business gain. Other similar technologies include ChainCast, Red Swoosh, Uprizer, eMikolo Networks, CenterSpan, Altnet, OpenCola, Radiance Technologies, and PeerGenus.

V. Looking Forward: P2P's Place in the Future of the Entertainment Industry

41. It is my opinion that peer-to-peer networks are a permanent feature of the internet landscape. Like other online information platforms, such as email, FTP, and the web, I believe P2P will continue to be used for both legal and illegal purposes, and that its net effect on commerce and culture will be positive.

42. I find it difficult to believe that free file-swapping networks will ever disappear; yet I also find it impossible to believe that they will ever be able to compete effectively with legal, commercial online media services. As with all gray and black markets, free music swapping networks pose at least as much risk as benefit to consumers, and I believe they are beginning to realize it; as I discussed above, experienced file sharers are far more likely to say they're willing to pay for online music services than other online music fans who don't swap. This is because free file sharing networks have exposed them to the enormous potential of digital media. It only remains for legitimate commercial services to appear and deliver on the promise. This requires a greater degree of creativity and willingness to experiment on the part of rights holders than we have seen thus far.

43. I also believe that the true power of P2P as an information architecture has yet to be realized. Its potential applications reach far beyond today's music- and media-sharing communities, and far beyond the mere cost savings offered by companies like Blue Falcon and Kontiki. The promise of the digital age is ubiquitous access to information and instantaneous communication between millions of

people. P2P, more than any other technology, is the embodiment of that promise. Put another way, the definitive human social structure is the marketplace, and P2P represents the ultimate marketplace – one in which goods, services and ideas can all be swapped on a level playing field without a centralized authority or needless intercession by brokers.

44. In order for P2P to deliver on its promise, however, there must be opportunity for development. This means a legal and regulatory environment that does not stifle innovation. Otherwise, the ideas and inventions that shape the century to come will develop elsewhere, or not at all.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of September at 2002.

/s/

Aram Sinnreich

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))
[Filed Sept. 9, 2002]	

DECLARATION OF JOHN BUSHER

I, John Busher, hereby declare:

1. I am Vice-President-Sales & Business Development for Acoustica, Inc., a small software company based in Oakhurst, California. I have held this position since approximately October 2001. I have personal knowledge of the matters stated herein and if called as a witness, could and would testify competently thereto under oath.

2. As Vice President of Sales & Business Development, one of my principal responsibilities is to sell and promote Acoustica's software products.

3. Because Acoustica is a small company (with less than ten employees), we have a limited advertising and sales budget. As a result, I am always interested in finding new and inexpensive channels to market and promote Acoustica's software.

4. One way in which Acoustica regularly promotes its software is through the distribution of free copies of "trialware," which are trial versions of Acoustica software. These trial versions allow a user to use a version of Acousrica software free for a period of dine before they

decide whether or not to purchase the regular commercial version of the product.

5. In order for the trialware marketing strategy to be successful, it is important for Acoustica to have the trial versions of its software distributed as widely and as many times as possible.

6. In order to achieve wide distribution of its trialware, Acoustica has freely distributed version of trialware of each of its software programs on both the Gnutella and FastTrack networks.

7. I have set up my home computer, which I also use for business, as a peer on the Gnutella network so that other Gnutella network users may freely download trialware copies of Acoustica software. I have observed that these trialware versions of Acoustica software are regularly downloaded at least once or twice each week from my computer.

8. I estimate that Acoustica generates sales of between $1,000 and $10,000 per month as a result of the distribution of its trialware software through the Gnutella and FastTrack Networks. I believe that these sales figures will increase in the future as Acoustica's trialware is more widely distributed through these networks.

9. In addition to sales of Acoustica's product, marketing through the Gnutella and FastTrack Networks provides additional benefits to Acoustica.

10. First, distribution of trialware through each of these Networks is positive and beneficial for Acoustica because it results in greater brand awareness of Acoustica.

11. Second, by using the Gnutella and FastTrack Networks to distribute trialware, Acoustica saves money by not having to provide additional server resources and internet bandwidth for its own network. In other words, individuals

who are connected to the Gnutella or FastTrack Networks using a client application such as Morpheus, Limewire, Bearshare (Gnutella clients), or Kazaa or Grokster (FastTrack Clients), interested in downloading trialware versions of Acoustica software can do so through the peer to peer network, rather than having to log onto Acoustica's website and download these programs directly. As a result of the existence of these network-based methods of distribution, Acoustica does not have to pay for the additional bandwidth which would otherwise be needed to accommodate this higher volume of download traffic from its website. This results directly in dollar savings to Acoustica.

12. Third, our use of the trialware marketing strategy in conjunction with the Gnutella and FastTrack Networks results in reduced software piracy. Specifically, because Acoustica distributes free trialware versions of its software through peer to peer networks, individuals can test the software without having to buy it first. Therefore, there is little incentive for individuals to crack/hack (illegally copy) the commercial version of the software in order to try it out. In other words, if it is easier to download a copy of the trial version of the software through a peer to peer network than it is to hack the commercial version of the software and make an illegal copy of it, many individuals will simply use the trial version.

13. If either the FastTrack network or the Gnutella network were to be shut down or somehow disabled, Acoustica would lose a valuable marketing channel for its products.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in San Francisco, California on September 9, 2002.

/s/
John Busher

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))
[Filed Sept. 9, 2002]	

DECLARATION OF PATRICA D. HOEKMAN IN SUPPORT OF DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Patricia D. Hoekman, do hereby declare:

1. My name is Patricia D. Hoekman.

2. I am a Senior Litigation Paralegal at the law firm of Brobeck Phleger and Harrison LLP, 1230 El Camino Real, San Diego, California, 92130.

3. On September 8, 2002 I used the Morpheus 2.0 software program and searched the "video" category for "President Bush speeches." This search found several video recordings. Attached as Exhibit A is a true and correct copy of the results from this search.

4. On September 8, 2002 I used the Morpheus 2.0 software program and searched the "document" category for Project Gutenberg documents. The searches were "Declaration of Independence", and "Bible". These searches found various documents. Attached as Exhibit B are true and correct copies of the results from these searches. I was able to download the file entitled "Declaration of Independence"

and confirmed that it was a true and correct Etext copy of this work.

5. On September 8, 2002 I used the Morpheus 2.0 software program and searched the "audio" category for the Jive Media file "Lil' Romeo-My Baby." This search found corresponding files. I downloaded a file and confirmed that it was an audio recording of "Lil' Romeo's My Baby." Attached as Exhibit C is a true and correct copy of the results from this search.

6. On September 8, 2002 I used the Morpheus 2.0 software program and searched the "audio" category for "Live Recordings from "Pearl Jam", "Phish" "Dave Matthews" and "John Mayer". This search found numerous audio recordings. Attached as Exhibit D are true and correct copies of the results from these searches. I downloaded six of the audio files and confirmed that they were live audio recordings of Pearl Jam, Dave Matthews and John Mayer.

7. Attached as Exhibit E are true and correct copies of the sharing policies posted for the bands mentioned in paragraph 6 above.

8. On September 8, 2002 I used the Morpheus 2.0 software program and searched the "everything" category for the file "WinZip81.exe". One corresponding file was found. I downloaded the file and confirmed that it was WindZip81.exe. A true and correct copy of the search result is attached hereto as Exhibit F.

9. On September 8, 2002, I used the Morpheus 2.0 software program and searched the "everything" category for "NASA". One corresponding video file was found. A true and correct copy of the search result is attached hereto as Exhibit G.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 9th day of September at San Diego, California.

/s/
Patricia D. Hoekman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF JONATHAN COLE

I, Jonathan Cole, the undersigned, declare:

1. I am a Practice Support Coordinator at O'Melveny & Myers LLP in Los Angeles. I have personal knowledge of the following facts and could, if called and sworn as a witness, competently testify thereto.

2. Fourteen copyrighted motion pictures are listed in Exhibit A to the First Amended Complaint. (Those same titles were listed in Exhibit A to the original Complaint.) They are follows:

Title	Plaintiff
"Final Fantasy"	Columbia Pictures Industries, Inc.
"A Knight's Tale"	Columbia Pictures Industries, Inc.
"The Princess Diaries"	Disney Enterprises, Inc.
"Jeepers Creepers"	Metro-Goldwyn-Mayer Studios Inc.

"Hannibal"	Metro-Goldwyn-Mayer Studios Inc./Universal City Studios LLLP
"Legally Blonde"	Metro-Goldwyn-Mayer Studios Inc.
"Rush Hour"	New Line Cinema Corporation
"The Rat Race"	Paramount Pictures Corporation
"Lara Croft: Tomb Raider"	Paramount Pictures Corporation
"The Truman Show"	Paramount Pictures Corporation
"Exit Wounds"	Time Warner Entertainment Co., L.P.
"Moulin Rouge"	Twentieth Century Fox Film Corporation
"Planet of the Apes"	Twentieth Century Fox Film Corporation
"American Pie 2"	Universal City Studios LLLP

3. I have personally downloaded computer files containing each of these fourteen motion pictures three separate times – once using each of the Morpheus system, the Grokster system, and the Kazaa Media Desktop system. In most cases, the motion picture was contained in two separate computer files, each containing about half the length of the film. In each instance, after downloading the pertinent file, I opened and examined the file and confirmed that it in fact contained a copy of a motion picture listed above. I was able to download a complete copy of each of the fourteen motion pictures using each of the three systems, with just one

exception. I was able to download only the first half of "Rush Hour" using the Morpheus system.

4. I have regularly been able to download motion pictures using Defendants' systems very shortly after the pictures enter domestic theatrical release and while they are still playing in theaters. The following table provides some examples (all dates are in 2002):

Title	Release	Morpheus Download	Grokster Download
"Lilo and Stitch"	June 21	July 3	July 8
"Minority Report"	June 21	July 11	July 3
"Signs"	August 2	August 12	August 19
"XXX"	August 9	August 26	August 26
"Blue Crush"	August 16	September 3	August 26

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 6, at Los Angeles, California.

/s/

Jonathan Cole

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

[Filed Sept. 9, 2002]

DECLARATION OF MELANIE I. BREEN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENTAGAINST DEFENDANTS KAZAA BV, STREAMCAST NETWORKS, MUSICCITY NETWORKS, INC., AND GROKSTER, LTD.

I, Melanie I. Breen, declare as follows:

1. I am an attorney and a member of the Bar of the States of New York and Massachusetts. On March 20, 2002, this Court granted my application to appear pro hac vice in this action. I am associated with Paul, Weiss, Rifkind, Wharton & Garrison, co-counsel to the plaintiffs in *Leiber, et al. v. Consumer Empowerment BV, et al.*, No. CV 01-9923-SVW (PJWx) ("the *Leiber* plaintiffs"). I make this declaration in support of plaintiffs' Motion for Partial Summary Judgment against defendants Kazaa BV (f/k/a Consumer Empowerment BV), StreamCast Networks (f/k/a MusicCity.com Inc.), MusicCity Networks, Inc., and Grokster, Ltd. (collectively "Defendants"). I have personal knowledge of the facts contained herein, and, if called upon

as a witness, I could and would testify competently, except for those matters stated expressly upon information and belief, which matters I believe to be true.

2. I am informed and believe that the *Leiber* plaintiffs have not, at any time, authorized Defendants to use the *Leiber* plaintiffs' copyrighted works on the Kazaa, Grokster, or Morpheus systems and services ("Defendants' Systems and Services"). Indeed, investigations beginning in the fall of 2001 and continuing through August, 2002 revealed that the *Leiber* plaintiffs' copyrighted works have persistently been made available on Defendants' Systems and Services without permission.

3. The *Leiber* plaintiffs have provided notice to Defendants that their copyrighted works were available on Defendants' Systems and Services. Nonetheless, Defendants have never taken any action to remove these works.

4. In November, 2001 the *Leiber* plaintiffs filed their complaint in this action, providing notice that 12 specific copyrighted works (the "Complaint Works") were available on Defendants' Systems and Services.

5. In February 15, 2002, the *Leiber* plaintiffs provided further notice to Defendants that the Complaint Works were available on Defendants' Systems and Services through the Declaration of Theodore K. Cheng, Esq. in Support of the *Leiber* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Cheng Decl. I"), and the exhibits thereto.

6. On February 12 and 13, 2002, searches were run on Defendants' Systems and Services for the Complaint Works. These searches were conducted under the supervision of Mr. Cheng. (*See* Cheng Decl. I, 2.) All of these works were located on Defendants' Systems and Services. To document finding the Complaint Works on Defendants' Systems and

Services, computer screen shots were taken of the search results screens, and the songs were downloaded in MP3 format, saved to computer hard drives, and verified as the Complaint Works using media players such as Windows Media Player or RealPlayer. The computer screen shots and downloaded song files were included as exhibits to the Cheng Declaration. On February 15, 2002, Defendants were served with the papers comprising Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, including the Cheng Declaration accompanied by the computer screen shots and CD-ROMs containing the Complaint Works downloaded from Defendants' Systems and Services.

7. On April 22, 2002, the *Leiber* plaintiffs filed their Second Supplemental Disclosures, which included a list of 22 works that are owned and/or controlled by the *Leiber* plaintiffs (the "Phase I Works"). The Phase I Works included many of the Complaint Works. Attached as Exhibit A is a true and correct copy of the *Leiber* plaintiffs' Second Supplemental Disclosures.

8. On May 24, 2002, through the *Leiber* Plaintiffs' Motion for Leave to Amend the Complaint and related papers, the *Leiber* plaintiffs provided notice to the Defendants that the Phase I Works were available on Defendants' Systems and Services.

9. On June 17, 2002, the *Leiber* plaintiffs provided additional notice that the Phase I Works were available on Defendants' Systems and Services through their Third Supplemental Disclosures.

10. On July 22, 2002, through their Fourth Supplemental Disclosures, the *Leiber* plaintiffs once again provided notice that the Phase I Works were available on Defendants' Systems and Services.

11. Despite the fact that Defendants had repeatedly been put on notice that the *Leiber* plaintiffs' Phase I Works were being made available on Defendants' Systems and Services, Defendants took no action to cease and desist from infringing the *Leiber* plaintiffs' copyrights in the Phase I Works. During May 2002, over 2,000 copyrighted musical works, for which Class members own and/or control the copyrights, also were available on Defendants' Systems and Services. Many of the Phase I Works were among those located on Defendants' Systems and Services.

12. On May 31, 2002, Defendants were again put on notice that the Phase I Works were available on their Systems and Services. Jacqueline Charlesworth, Senior Vice President and Counsel to the Harry Fox Agency, Inc. ("HFA"), which acts as a licensing agent for 27,000 music publisher-principals, many of whom are Class members, sent letters on that date to all Defendants and their counsel, requesting that Defendants cease and desist from using their Systems and Services directly and indirectly to cause, contribute to, enable, facilitate, induce, encourage, and participate in the infringement of the HFA-affiliated music publishers' copyrighted works. Ms. Charlesworth attached to her letters a report demonstrating the availability of 2,000 works, the copyrights for which are owned and/or controlled by Class members, on Defendants' Systems and Services.

13. Again in June, 2002, over 7,000 copyrighted musical works, for which Class members own and/or control the copyrights, were available on Defendants' Systems and Services. Many of the Phase I Works were among those located on Defendants' Systems and Services.

14. On June 25, 2002, Ms. Charlesworth again provided Defendants with notice that Class members' copyrighted works, including the Phase I Works, were available on their systems and services. Ms. Charlesworth sent letters on that

date to Defendants and their counsel, requesting that Defendants cease and desist from using their Systems and Services directly and indirectly to cause, contribute to, enable, facilitate, induce, encourage, and participate in the infringement of the HFA-affiliated music publishers' copyrighted works. Ms. Charlesworth attached to her letters a report demonstrating the availability of the 7,000 copyrighted works, copyrights for which are owned/and or controlled by Class members, on Defendants' Systems and Services. Many of the Phase I Works were identified in this report as being available on Defendants' Systems and Services.

15. In August, 2002, the Phase I Works were again found to be available on Defendants' Systems and Services. On August 9, 2002, Ms. Charlesworth sent letters to all Defendants and their counsel, requesting that Defendants cease and desist from using their Systems and Services directly and indirectly to cause, contribute to, enable, facilitate, induce, encourage, and participate in the infringement of the HFA-affiliated music publishers' copyrighted works. Ms. Charlesworth attached to her letters a report demonstrating the availability of the Phase I Works on Defendants' Systems and Services.

16. In disregard of Ms. Charlesworth's cease and desist letters, and despite being put on notice numerous times that the Phase I Works were available on Defendants' Systems and Services, Defendants persisted in allowing the Phase I Works to be available on their Systems and Services.

17. Under my direction, various searches using the Defendants' Systems and Services were conducted on August 20 through August 23, 2002. At random times during those three days, searches were run on all three of Defendants' Systems and Services using each of the Phase I Works. True and correct copies of computer screen shots of

the search results on the Kazaa System and Service are attached as Exhibit B. True and correct copies of computer screen shots of the search results on the Morpheus System and Service, are attached as Exhibit C. True and correct copies of computer screen shots of the search results on the Grokster system and service are attached as Exhibit D. As these computer screen shots demonstrate, multiple copies of the Phase I Works were available for downloading on each of the services.

18. One song was selected at random from each individual search, verified as one of the Phase I Works, and downloaded to a computer hard drive as an MP3 file. True and correct copies of the fully downloaded songs can be found in folders relating to the three services on a CD-ROM included as Exhibit E. These MP3 files can be played on a computer by inserting the CD-ROM into a CD drive and using an application such as RealPlayer, which can be found at the website <www.realguide.com>.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6th day of September, at New York, New York.

/s/

Melanie I. Breen

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF PATRICK BRESLIN IN SUPPORT OF MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT ON LIABILITY

DECLARATION OF PATRICK BRESLIN

I, Patrick Breslin, the undersigned, declare:

1. I am the Chief Executive Officer of Relatable. I make this declaration in support of Plaintiffs' Motion for Summary Judgment on Liability. I have personal knowledge of the following facts, and if called and sworn as a witness could and would testify competently thereto.

2. Based in Alexandria, Virginia, Relatable is a privately held company founded in November 1999. Relatable is a leading provider of advanced content identification and personalization technologies for the digital delivery of audio and video content. Relatable's patent-pending acoustic fingerprint technology (called TRM) is an industry leader in terms of its proven ability to accurately identify millions of digital audio files on a mass-market scale and is able to do so without significant negative impact on a large-scale network's performance.

3. In my role as Chief Executive Officer of Relatable, I am responsible for Relatable's overall management as well as business development and finance activities. These include analyzing the business opportunities for our advanced technology solutions, identifying customer prospects for software products such as TRM acoustic fingerprint technology, negotiating software license agreements and managing relationships with customers.

4. Relatable is not affiliated with any of the plaintiffs in this action and does not have a business relationship with any plaintiff.

5. Some or all of the defendants have stated repeatedly in the news media that there is no way to prevent unauthorized content from being made available over their systems. To the contrary, Relatable has developed a product called TRM, which can be used, among many other uses, to identify digital audio files that a user places in his or her "share folder" on a peer-to-peer ("P2P") file trading system, such as the P2P systems operated by defendants Grokster, Kazaa, and MusicCity. TRM allows a licensee to identify unauthorized files that a user places in his or her "share folder" so that it can block them from being available to other users in the system. TRM can be implemented in a P2P system, as described below.

6. TRM software is a client-server solution. A layer of TRM software is integrated into a client application, such as a P2P application on the user's PC, through which TRM generates identifiers for song files users place in their "share folders." The TRM client layer sends the identifiers (called "acoustic fingerprints" and described further below) to a TRM server within the P2P network's infrastructure. The TRM server contains a reference database of fingerprints and determines whether the fingerprint generated on the client PC matches the fingerprint of an existing recording in the

database, to determine whether access to the user's file should be allowed.

7. The largest scale usage of TRM was when Napster integrated the technology into its P2P network, to allow the robust identification of audio content that users designated for file sharing. These fingerprints were in turn used to allow the filtering (using a "filter in" model as described below) of users' files, to prevent further file-sharing of copyrighted works not under license. TRM has also been used to identify radio station broadcasts, by generating radio airplay logs in the US and Europe, and for CD content identification.

RELATABLE'S TRM TECHNOLOGY

8. TRM is a technology that generates a unique "acoustic fingerprint" for a digital audio file that is based entirely on the acoustical properties of the recording the file represents. Much like a human fingerprint, an acoustic fingerprint identifies with virtual certainty the recording's unique acoustical properties.

9. The TRM software generates this acoustic fingerprint by analyzing a large number of the acoustic properties of the sound contained in the digital audio file. TRM breaks down a recording into segments and then takes measurements of certain acoustic properties of each segment. Using a special algorithm, the resulting measurements are transformed into a code, which is unique to each recording. (An algorithm is simply a detailed sequence of actions that the software instructs the computer to perform to accomplish a specific task – here, the creation of the fingerprint.) Using this method, TRM generates a unique code (the fingerprint) for each recording, as well as for each digitized copy of any given recording of a song, with different codes for live tracks, remixes, and performances of the same work by different artists. Just as a person's fingerprint is much smaller than the entire person but still positively identifies

the person, the fingerprint that TRM generates is much smaller than the recording itself, because the fingerprint extracts only certain unique identifying information about the sonic properties of the recording. For example, an acoustic fingerprint for one song recording would be about 1500 bytes of data, compared to about 3 megabytes of data (2,000 times the size of the fingerprint) for the recording itself in a compressed format, such as MP3, and 50 megabytes of data (over 30,000 times the size of the fingerprint) for a song in an uncompressed digital format. This much smaller size makes the fingerprint easy to store, send, and compare to fingerprints for other recordings.

10. Audio files can be digitally encoded in a variety of formats, each of which uses a particular algorithm to compress the data to reduce the amount of space the file uses on the computer, making it easier for the user to both store and transfer the file. Some formats, including MP3, reduce the size of the file by discarding unnecessary data, such as sound frequencies that are outside the range of human hearing. TRM can identify audio files that have been encoded using any of the most popular digital audio formats, including MP3, Ogg Vorbis, Real, or Windows Media Audio.

11. TRM also identifies digital audio files at widely varying bit rates. The bit rate is the number of bits (small pieces of data) that pass a given point in a network in a given amount of time, usually a second. Thus, a bit rate is usually measured in some multiple of bits per second - for example, kilobits, or thousands of bits per second (Kbps). The higher the bit rate, the larger the file and the better the sound quality. Users can set the bit rate at several different levels, but TRM will accurately identify audio at bit rates from the highest quality down to 16 Kbps or below, bit rates that are far below AM quality, for example. Users generally prefer audio files

compressed at much higher quality bit rates, at least 56Kbps and more often 96Kbps, 128Kbps or above.

12. Because it interprets the kind of audio information that humans actually hear, TRM can be used to identify an audio file regardless of whether the person providing the file has accurately labeled the recording, or has labeled it at all. For example, TRM recognizes the recording, whether or not the song title, artist name, or other related information is accurate or available.

13. Integral to the TRM system is a reference fingerprint database, which consists primarily of fingerprints of digital audio files provided by companies that license TRM (for example, a record company that owns the copyrights to recordings), or obtained from a third party that has such databases, such as Loudeye, Muze, and Reciprocal. TRM creates a digital fingerprint of each recording supplied by the licensee or third party in the manner described above, and stores that fingerprint in the reference database.

14. The reference database also includes "metadata" associated with each audio file. Metadata is literally "data about data" – including textual information like artist, title, album, and label, and electronic data, such as track duration. Metadata can be mapped to the fingerprint in a database without affecting the quality of the sound. Thus, the reference database includes both an audio fingerprint of each recording and associated metadata that identifies the recording that has been fingerprinted.

15. TRM identifies an unknown digital recording by generating a fingerprint of the unknown recording (in the same way it generated the fingerprints in the reference database), and comparing that fingerprint at a very high speed to the fingerprints in the reference database. (In internal tests, a commercial version of TRM was able to handle over 5000 fingerprint matches per second, or up to

billions of queries per day. Actual match rates vary depending on the size of the fingerprint database. However, under real world conditions with many millions of fingerprints in a database, TRM has been proven to handle query rates in the thousands per second per server. Adding servers to the system proportionately increases the number of queries the system can handle by an equal factor.) If the fingerprint of the unknown recording matches a fingerprint in the reference database, TRM identifies the unknown recording as a copy of the matching recording in the reference database. Using the metadata stored in the reference database along with the digital fingerprints, TRM identifies the unknown recording by artist, title, album, label, etc., depending on the availability and accuracy of such metadata in the database.

16. If the fingerprint of the unknown recording does not match any fingerprint of a known recording in the reference database, TRM can, if desired, add the newly created fingerprint of the unknown recording to the reference database, together with any metadata associated with that specific file.

IMPLEMENTATION IN A P2P SYSTEM

17. I am familiar with P2P systems generally, including the defendants' P2P systems through news articles and other publicly available information. I am generally familiar with the architecture of the systems and their mode of operation.

18. TRM software solutions are available to license, including to defendants.

19. TRM can operate in two different ways to enable recordings to be blocked from being made available without authorization from the copyright holder on defendants' P2P systems. First, TRM can create a reference database of fingerprints of recordings that are authorized for distribution.

Then, when TRM compares the fingerprints of recordings that P2P users make available to all of the fingerprints in that reference database, if the fingerprint of an offered available recording matches a fingerprint in the reference database, the P2P system will permit the recording to be available to other users, but, if there is no match, the P2P system will block the recording from being made available. This is commonly known as a "filter-in" mechanism. This is essentially a highly automated way for each user of the P2P system to seek permission from the rights holders before distributing making a copyrighted recording available.

20. Alternatively, TRM can create a reference database of fingerprints of protected recordings, i.e., recordings that are not authorized to be made available to other users in the P2P system. In this scenario, when TRM compares the fingerprints of recordings that P2P users make available to all of the fingerprints in that reference database, if the fingerprint of the offered recording matches a fingerprint in the reference database, the P2P system will block the offered recording from being available to other users, but if there is no match, will permit the offered recording to be available to other users. This is commonly known as a "filter-out" mechanism. In a modified form, a "filter-out" system would track the unmatched recordings that are available, via the acoustic fingerprint, to allow for future compensation of copyright holders for all distribution of the digital recording.

21. TRM could be used in a P2P system without any significant degradation in the system in different ways depending on the architecture of the system itself. The TRM servers are designed to function in a scalable cluster, where the system can increase the number of queries per second it can handle by simply adding additional servers to the cluster. This allows a central cluster of only a dozen servers to handle tens of thousands of queries per second, which reduces to a

minimum any potential network degradation for introducing content identification in a central fashion to a P2P network. Additionally, it is possible to develop a distributed version of TRM, for decentralized P2P networks, which would allow the distribution of the content identification database and resolution tasks throughout the P2P network. In both cases, due to the inherent scalability and speed of TRM, integration with a network performing even billions of transactions per day is feasible.

22. Because of the broad range of acoustic properties that TRM uses to create the fingerprint, I believe that any effort to alter an audio recording to circumvent TRM would have to be so significant that it would audibly degrade the quality of the audio file.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 5, 2002, at Alexandria, Virginia.

/s/
PATRICK BRESLIN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF JACQUELINE C. CHARLESWORTH IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AGAINST DEFENDANTS KAZAA BV, STREAMCAST NETWORKS, MUSICCITY NETWORKS, INC., AND GROKSTER, LTD.

I, Jacqueline C. Charlesworth, declare as follows:

1. I am an attorney and a member of the Bar of the State of New York. I am Senior Vice President and General Counsel to The Harry Fox Agency, Inc. ("HFA"). I have personal knowledge of the facts contained within this declaration, and, if called upon as a witness, I could and would testify competently, except as to those matters stated expressly on information and belief, which matters I believe to be true. I submit this motion in support of the plaintiffs' Motion for Partial Summary Judgment.

2. HFA is a wholly owned subsidiary of National Music Publishers' Association, Inc. Established in 1927, HFA serves as agent on behalf of its 27,000 music publisher-principals in licensing copyrighted musical compositions for reproduction and distribution as physical phonorecords (CDs, cassette tapes, and phonograph records), and over the Internet as digital phonorecord deliveries.

3. By appointing HFA as their common licensing collection agent, the named plaintiffs and other class members in *Leiber, et. al v. Consumer Empowerment BV, et. al*, Case No. CV 01-09923-SVW (PJWx), have confirmed their interest in generating royalties by licensing their copyrighted musical works.

Materials Relating to Infringement on the MusicCity System and Service

4. Attached hereto as Exhibit A is a true and correct copy of a letter, dated May 31, 2002, from me to Andrew P. Bridges, Esq., on behalf of StreamCast Networks, Inc., enclosing a letter to Steve Griffin at StreamCast Networks, Inc. requesting that StreamCast cease and desist from using the MusicCity System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of about 2,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the MusicCity System and Service.

5. Attached hereto as Exhibit B is a true and correct copy of a letter, dated July 12, 2002, from me to Charles S. Baker, Esq., on behalf of StreamCast Networks, Inc., enclosing a letter to Steve Griffin at StreamCast Networks, Inc. requesting that StreamCast cease and desist from using the MusicCity System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of the same prior 2,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the MusicCity System and Service.

6. Attached hereto as a Exhibit C is a true and correct copy of a letter, dated June 25, 2002, from me to Charles S.

Baker, Esq., on behalf of StreamCast Networks, Inc., enclosing a letter to Steve Griffin at StreamCast Networks, Inc. requesting that StreamCast cease and desist from using the MusicCity system and service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of another 7,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the MusicCity System and Service.

7. Attached hereto as Exhibit D is a true and correct copy of a letter, dated August 9, 2002, from me to Charles S. Baker, Esq., on behalf of StreamCast Networks, Inc., enclosing a letter to Steve Griffin at StreamCast Networks, Inc. requesting that StreamCast cease and desist from using the MusicCity System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of twenty-two copyrighted musical works owned or controlled by HFA-affiliated publishers on the MusicCity System and Service.

Materials Relating to Infringement on the Grokster System and Service

8. Attached hereto as Exhibit E is a true and correct copy of a letter, dated May 31, 2002, from me to Michael H. Page, Esq., on behalf of Grokster LTD., enclosing a letter to Mr. Eugene Herbert at Grokster LTD. requesting that Grokster cease and desist from using the Grokster System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of about 2,000 copyrighted musical works owned

or controlled by HFA-affiliated publishers on the Grokster System and Service.

9. Attached hereto as a Exhibit F is a true and correct copy of a letter, dated June 25, 2002, from me to Michael H. Page, Esq., on behalf of Grokster LTD., enclosing a letter to Mr. Eugene Herbert at Grokster LTD. requesting that Grokster cease and desist from using the Grokster System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of another 7,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the MusicCity System and Service.

10. Attached hereto as Exhibit G is a true and correct copy of a letter, dated August 9, 2002, from me to Michael H. Page, Esq., on behalf of Grokster LTD., enclosing a letter to Mr. Eugene Herbert at Grokster LTD. requesting that Grokster cease and desist from using the Grokster System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of twenty-two copyrighted musical works owned or controlled by HFA-affiliated publishers on the Grokster System and Service.

Materials Relating to Infringement on the Kazaa System and Service

11. Attached hereto as Exhibit H is a true and correct copy of a letter, dated May 31, 2002, from me to Kenneth B. Wilson, Esq., on behalf of Kazaa B.V. enclosing a letter to Mr. Niklas Zennstrom at Kazaa BV requesting that Kazaa cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate,

induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of about 2,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

12. Attached hereto as Exhibit I is a true and correct copy of a letter, dated July 12, 2002, from me to Philip S. Corwin, on behalf of Sharman Networks Ltd. enclosing a letter to Nicola Hemming at Sharman Networks Ltd. requesting that Sharman Networks cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of the same prior 2,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

13. Attached hereto as Exhibit J is a true and correct copy of a letter dated July 12, 2002, from me to Nicola Hemming of Sharman Networks Ltd. requesting that Sharman Networks cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of the same prior 2,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

14. Attached hereto as a Exhibit K is a true and correct copy of a letter, dated June 25, 2002, from me to Kenneth B. Wilson, Esq., on behalf of Kazaa BV, enclosing a letter to Mr. Niklas Zennstrom of Kazaa BV requesting that Kazaa cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate,

induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of another 7,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

15. Attached hereto as Exhibit L is a true and correct copy of a letter, dated June 25, 2002, from me to Philip S. Corwin, on behalf of Sharman Networks Ltd., enclosing a letter to Nicola Hemming at Sharman Networks requesting that Sharman Networks cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of the same prior 7,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

16. Attached hereto as Exhibit M is a true and correct copy of a letter dated July 12, 2002, from me to Nicola Hemming of Sharman Networks Ltd. requesting that Sharman Networks cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of the same prior 7,000 copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

17. Attached hereto as Exhibit N is a true and correct copy of a letter, dated August 9, 2002, from me to Kenneth B. Wilson, on behalf of Kazaa BV, enclosing a letter to Mr. Niklas Zennstrom at Kazaa BV, requesting that Kazaa cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate,

induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and enclosing a report demonstrating the availability of twenty-two copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

18. Attached hereto as Exhibit O is a true and correct copy of a letter, dated August 9, 2002, from me to Philip S. Corwin, on behalf of Sharman Networks Ltd., enclosing a letter to Nicola Hemming at Sharman Networks requesting that Sharman Networks cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated music publishers' copyrighted works, and demonstrating the availability of the same prior twenty-two copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

19. Attached hereto as Exhibit P is a true and correct copy of a letter, dated August 9, 2002, from me to Nicola Hemming at Sharman Networks Ltd. requesting that Sharman Networks cease and desist from using the Kazaa System and Service to directly and indirectly cause, contribute to, enable, facilitate, induce, encourage and participate in the infringement of the HFA-affiliated publishers' copyrighted works, and demonstrating the availability of the same prior twenty-two copyrighted musical works owned or controlled by HFA-affiliated publishers on the Kazaa System and Service.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 14th day of August, 2002, at New York, New York.

/s/
Jacqueline C. Charlesworth

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF FRANK CREIGHTON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

I, FRANK CREIGHTON, the undersigned, declare:

1. I am Executive Vice President and Director of Anti-Piracy for the Recording Industry Association of America ("RIAA"), where I have been employed for over 17 years. I make this declaration in support of Plaintiffs' motion for summary judgment on liability against Defendants MusicCity.com, Inc. (now known as StreamCast Networks, Inc.), MusicCity Networks, and Grokster, Ltd., and Kazaa BV's in this action. I know all of the following facts of my own personal knowledge and, if called and sworn as a witness, could and would testify competently thereto.

2. The RIAA is a not-for-profit trade association, of which the record company plaintiffs in this action, among others, are members. The RIAA represents record companies that collectively create, manufacture, and distribute over 90 percent of all legitimate sound recordings sold commercially in the United States.

3. The record company plaintiffs in this action are engaged in the business of producing sound recordings, and manufacturing, distributing, selling, and/or licensing the distribution and sale of their sound recordings or arranging to do so, in the United States. The record company plaintiffs include the largest manufacturers of such sound recordings in the United States. These plaintiffs are the copyright owners of thousands of sound recordings of popular recording artists and also have the sole and exclusive right to manufacture, distribute, and sell certain recorded musical performances "fixed" prior to February 15, 1972, which are subject to protection under California statutory and common law.

4. The record company plaintiffs have invested and continue to invest substantial sums of money, as well as time, effort, and creative talent, to discover and develop recording artists, and create, manufacture, advertise, promote, sell, and license phonorecords embodying the performances of their exclusive recording artists.

5. One of the RIAA's functions is to combat piracy of our members' copyrighted sound recordings. The RIAA Anti-Piracy Unit, which I supervise, investigates the unauthorized duplication and distribution of copyrighted sound recordings of every type. As Executive Vice President and Director of Anti-Piracy, I am responsible for administering and overseeing all domestic investigations into the piracy of copyrighted sound recordings of all kinds, including over the Internet.

MusicCity's and Grokster's Operation of Infringing Napster-Like System

6. I am familiar with the Napster system, having investigated it as part of my anti-piracy duties for the RIAA. At some point after Napster became popular, the software that Napster used to operate its servers -- and which enabled those servers to maintain the index of works being made

available for copying and distribution over the Napster system and which provided the Internet addresses of users who had such works and those who were searching for them -- was reverse-engineered. (This fact was extensively discussed on the Internet.) This enabled individuals or entities that had no formal connection to Napster to maintain servers that ran the reverse-engineered Napster server software themselves to function as Napster-like systems. These servers became known as "OpenNap" servers. OpenNap servers operate like mini-Napsters for those individuals who had logged on to those servers. OpenNap servers became particularly popular after Napster began to filter some of the works available on its system, as those who ran OpenNap servers did not filter out the sound recordings available on those servers.

7. As part of my duties, I have also investigated, and am familiar with, OpenNap technology. MusicCity itself operated OpenNap servers for several months in early 2001. I am aware that Grokster also operated an OpenNap system in the past, which was called Swaptor. In so doing, these defendants enabled and facilitated the infringement of thousands of sound recordings owned by RIAA member companies, as well as other record companies, as I describe below. In fact, MusicCity was one of the single largest operators of publically accessible OpenNap servers, which MusicCity referred to on its web site as the "MusicCity.com OpenNap Alternative Network." In so doing, MusicCity encouraged, enabled, and facilitated the infringement of thousands of sound recordings owned by RIAA member companies, as well as other record companies, as I describe below. In fact, MusicCity advertised its OpenNap servers as the best alternative to Napster. MusicCity discontinued its OpenNap system and released its Morpheus application approximately (if not exactly) simultaneously, and it appears that users of MusicCity's OpenNap servers form the nucleus

of the user base for the MusicCity system. At the time of the switch-over from OpenNap to Morpheus, users of the MusicCity OpenNap servers were provided with a link to a site where such users could download the new MusicCity software that allowed them to access MusicCity's new service. Attached hereto as Exhibit 1 is a true copy of a print-out of an instant message providing a link to MusicCity's web site for downloading the new MusicCity software, Morpheus.

8. Defendants also sought to migrate users from other websites dedicated to copyright infringement. One such site is Audiogalaxy. The Audiogalaxy system, like that of defendants, was an extensive network that anonymously connected Internet users and encouraged and enabled them to pool their music files into a single database for unlawful copying and distribution. We sent numerous notices of Infringement to Audiogalaxy beginning as early as February 2001. Audiogalaxy initially implemented a rudimentary filtering system. In June 2002, Audiogalaxy entered a stipulated permanent injunction with many of the plaintiffs to this action to discontinue infringing their copyrights. It is my understanding that defendants employed migration tools to attract many of Audiogalaxy's former users.

9. At the time that MusicCity was operating OpenNap servers, our investigators determined that thousands of sound recordings owned by RIAA members were being copied and distributed without authorization over the MusicCity OpenNap system. On February 15, 2001, I sent written notice to Steve Griffin, the Chairman of MusicCity, of the massive infringement of RIAA members' works that MusicCity was facilitating and permitting to occur on its system. I further put MusicCity on notice that the MusicCity system was being used primarily for the purpose of the unauthorized copying and distribution of our member's

copyrighted sound recordings. At the same time, I provided Mr. Griffin with a representative sample of sound recordings that were being infringed on the MusicCity system, including sound recordings featuring such well known artists as Celine Dion, Mariah Carey, Depeche Mode, A Perfect Circle, and the B-52's. I demanded that MusicCity take immediate steps to prevent the dissemination of our members' sound recordings via the MusicCity OpenNap system. A true copy of my February 15, 2001, notice letter is attached to this declaration as Exhibit 2. Despite my letter, each of the sound recordings of which I provided MusicCity notice remained available on the MusicCity OpenNap system.

10. Following my notice letter, MusicCity banned the RIAA's IP address from its OpenNap system, thereby disabling our ability to access that system via our network connection. Attached to this declaration as Exhibit 3 is a true copy of a print-out of a screen capture showing this action by MusicCity. Following MusicCity's action, we still were able to access its OpenNap system via a dial-up connection.

11. On or about March 7, 2001, I received a letter from Andrew Bridges, counsel for MusicCity. A true copy of Mr. Bridges March 7, 2001, letter is attached to this declaration as Exhibit 4. Mr. Bridges asserted that MusicCity was under no obligation to act in response to my letter, but claimed that MusicCity would delete accounts of users whose user names were shown on screen shots of infringing sound recording files that I included with my February 15, 2001, notice. The gist of the remainder of the letter was that MusicCity would not take any other action to prevent the infringement of RIAA members' sound recordings on its system.

12. Disabling or deleting users accounts, as MusicCity proposed, is largely ineffective in preventing the infringement of sound recordings. First, if a MusicCity software end user's account is disabled or deleted, that end

user very easily and quickly can establish a new user name using the same software. Thus, literally within a matter of seconds after being disabled or deleted under one account, the same end user could be back on the system using a new account, offering the same infringing content for copying by others. Second, there are typically hundreds, if not thousands, of copies of popular sound recordings available on the MusicCity system. Preventing a particular user from offering one such copy for unauthorized distribution and copying by deleting that user account still leaves the other hundreds or thousands of copies of that sound recording available for unauthorized copying and distribution over the MusicCity system (and the systems of the other defendants). (I note that Napster initially also would claim to disable accounts of infringing users, with no effect on the availability of infringing files on the Napster system.) The only effective way to prevent infringement of a particular sound recording is to block or filter all copies of that sound recording from the system, something that I understand Napster was ultimately ordered to do.

13. On or about March 16, 2001, I responded to Mr. Bridges' March 7, 2001, letter, informing him that disabling users accounts was insufficient to prevent infringement on the MusicCity system, and once again demanded that MusicCity take steps to stop the infringing conduct on its system, and even suggested some steps MusicCity could take. In addition, to assist MusicCity in identifying RIAA members' sound recordings, I provided Mr. Bridges with a CD-ROM containing a list of approximately 400,000 works that RIAA Members owned or controlled. I asked MusicCity to ensure that those works would not be copied and distributed without authorization on the MusicCity system. A true copy of my March 16, 2001, letter is attached to this declaration as Exhibit 5. (Copies of CD-ROMs containing the content of the CD-ROMs included with all of the notice

letters provided to defendants, all of which letters are attached as exhibits to this declaration, are being lodged with the Court separately pursuant to the Court's Local Rules.)

14. On or about March 23, 2001, I received a response to my letter from Mr. Bridges, a true copy of which is attached hereto as Exhibit 6. Mr. Bridges claimed that he was "not sure there is any practical use to which MusicCity.com can put the information" in the CD-ROM I had provided. MusicCity once again refused to take action to prevent infringement of RIAA members' sound recordings on the MusicCity system. Infringement of those sound recordings continued unabated on the MusicCity OpenNap system.

Infringements Increase on Defendants' Systems

15. Sometime in April 2001, MusicCity apparently changed its system from one based on OpenNap servers. The result was a substantially more robust system that enabled and facilitated larger scale infringement of our members' sound recordings than before.

16. As part of our investigation and for evidence-gathering purposes, I supervised the process whereby experienced RIAA anti-piracy personnel accessed MusicCity, Grokster, and Kazaa at the RIAA offices using these defendants' standard software, conducted searches using various data sets, and collected downloads and screen shots of MP3 music files. As a measure of quality control, RIAA investigators periodically listened to downloaded music files to ensure that the downloaded work corresponded to the name of the MP3 music file. In virtually every instance where we listened to a downloaded music file, we found that the downloaded work matched the user-named file. Some of what we found is described fully below.

17. In or about late September/early October 2001, I supervised the downloading of certain of our members'

sound recordings from defendants' systems. Those sound recordings were included in the Complaint plaintiffs filed in this action. A true copy of a list of those sound recordings (which is attached as Exhibit B to the Complaint), is attached to this declaration as Exhibit 7.

18. On or about November 21, 2001, I put MusicCity on further notice of the wide scale infringement taking place on this newest manifestation of its system by sending a written notice of copyright infringement to MusicCity. I also sent written notices of infringement to the other two defendants in this action, Grokster and Kazaa BV (then known as Consumer Empowerment BV). Along with each letter, I enclosed a CD-ROM listing thousands of copyrighted sound recordings owned or controlled by our RIAA Member companies (along with over 3.5 million file names evidencing copies of such recordings) that were being made available for unlawful copying and distribution on defendants' systems. True copies of these three letters are attached to this declaration collectively as Exhibit 8. After defendants claimed that they purportedly were unable to open the files that we sent them, on December 20, 2001, I re-sent to each defendant in a different format the lists of works being made available without authorization on their systems, along with another notice of infringement. Attached to this declaration collectively as Exhibit 9 are copies of my December 20, 2001, notices of infringement to defendants.

19. We have continued to provide notices to each of the defendants regarding the infringing works available on their networks:

- On January 24, 2002, I sent notices of further evidence of infringement to each of the three defendants, enclosing CD-ROMs with a sampling of the infringing works available on defendants' respective systems. True copies of my January 24, 2002 letters are attached to this declaration collectively as Exhibit 10.

- On February 5, 2002, after Grokster and Kazaa had provided unsatisfactory responses to my earlier notices and MusicCity had failed to respond at all, I again sent notices of infringement to the three defendants, informing them of the continuing massive infringement of RIAA Members' copyrighted works on their respective systems. My letter to MusicCity enclosed another CD-ROM showing additional samples of infringing works available on its system. True copies of my February 5, 2002 letters are attached to this declaration collectively as Exhibit 11.

- On April 3, 2002, I sent additional notice letters to each of the three defendants, enclosing new CD-ROMs with a sampling of additional infringing works available on defendants' systems. True copies of my April 3, 2002 letters are attached to this declaration collectively as Exhibit 12.

- On June 21, 2002, I sent further notices of infringement to defendants Grokster and Kazaa, again enclosing CD-ROMs with a sampling of infringing works available on their systems. True copies of my June 21, 2002 letters are attached to this declaration collectively as Exhibit 13.

- On July 8, 2002, I again sent notices to defendants Grokster and Kazaa, enclosing CD-ROMs with a sampling of infringing works available on their systems. True copies of my July 8, 2002 letters are attached to this declaration collectively as Exhibit 14.

- On August 15, 2002, I sent further letters giving defendants MusicCity and Grokster notice of the massive infringement occurring on their respective systems, enclosing CD-ROMs with a sampling of infringing works available on those systems. True copies of my August 15, 2002 letters are attached to this declaration collectively as Exhibit 15.

- On August 22, 2002, I sent additional letters giving defendants MusicCity and Grokster notice of the infringements occurring on their respective systems, enclosing CD-ROMs with a sampling of available infringing works. True copies of my August 22, 2002 letters are attached to this declaration collectively as Exhibit 16.

- On September 3, 2002, I once again sent infringement notices to defendants MusicCity and Grokster, enclosing CD-ROMs with a sampling of infringing works available on their systems. True copies of my September 3, 2002 letters are attached to this declaration collectively as Exhibit 17.

20. Through the above-described notice letters, I have provided defendants with notice of over 8 million infringing files available on their systems. Those over 8 million files represent infringement of more than 80,000 different sound recordings for which RIAA members own copyrights.

Works Located on Defendants' Systems At the Time of MusicCity's Initial Motion for Partial Summary Judgment

21. On February 9, 2002, the RIAA caused searches to be performed on the MusicCity system, using the standard MusicCity client software, for the 24 recordings listed on Exhibit B to the Complaint filed in this action (the

"Complaint Recordings"), and for the recordings identified in the February 3, 2002 SoundScan Hot 100 Singles report, to determine if these recordings were available on the MusicCity system.

22. On that same date, searches were also conducted for the materials specifically identified as "public domain works" in the declarations submitted in support of Defendants' previous motion for partial summary judgment. There were a total of 187 such works identified.

23. For each document, defendants' systems were searched in various ways, including, among others: the precise author's name and document title; the precise author's name (without the document title); and the precise document title (without the author's name).

24. The search conducted on February 9 located infringing files for ***all of*** the 24 Complaint Works and ***all of*** the Sound Scan Hot 100 Singles, with an average of 106 available copies for each title. True and correct copies of screen shots reflecting these searches and results for the Complaint Recordings are attached to this declaration as Exhibit 18.

25. The search for the public domain works was a failure, as it was unable to locate 178 of the 187 identified works. Of the nine documents that were located, only 1 copy typically was available. In contrast to the searches for the Complaint Recording and the Sound Scan Hot 100 Singles, which returned an average 106 search results for each title, the search for the public domain works returned an average of 0.23 results per title. A true copy of the search results for the public domain documents is attached to this declaration as Exhibit 19.

26. With regard to the public domain works, the title located most often was that of the WinZip 8.1 software. On

February 9, eight copies of this software were found. While copies of the evaluation version of the software (which may be publicly distributed consistent with the license agreement) were located, the search also found copies of the non-evaluation version of WinZip 8.1. This proprietary version is sold by the company and is accompanied by a license agreement preventing further distribution. A true copy of that license agreement is attached to this declaration as Exhibit 20.

Works Subsequently Located on Defendants' Systems

27. My staff, under my direction and supervision, recently investigated the availability on MusicCity and Grokster of the most popular recordings released over time. Not surprisingly, these works were easily located on the FastTrack network through the Grokster system, and through the MusicCity system. The following data sets were researched between August 25, 2002, and September 9, 2002:

- *The Billboard "Hot 100" List:* *Billboard* is a leading publication in the music field and is used by music professionals worldwide. *Billboard* prepares a weekly list of the 100 recordings receiving the most radio air play and retail sales in the United States (known as the "Hot 100" List). That list contains identifying information for each of these recordings, including the artist's name, the song title, the name of the record label that released the work, and the names of the songwriters of the musical compositions. We conducted searches for, and downloaded, the recordings listed in the "hot 100" List that appeared in the August 25, 2002, *Billboard*. Attached hereto as Exhibit 21 is a true and correct copy of the *Billboard* "Hot 100" List for the week of August 25, 2002. ***Every single***

recording in the Billboard "Hot 100" listed in the August 25, 2002, issue was available for download on the FastTrack network through the Grokster system and on the MusicCity system. In lieu of lodging CD-ROMs containing these downloads (and those described in the rest of this paragraph and the immediately following paragraph), all of these downloads will be posted on a secure FTP site accessible to both defendants and the Court.

- *The Top 10 Recordings Every Week For the Past Year*: We conducted searches for, and downloaded, the top 10 recordings listed in the "Hot 100" for the past year, as identified in the *Billboard* issues dated August 25, 2001, through August 25, 2002. Attached hereto as Exhibit 22 is a true and correct copy of a schedule of the top 10 recordings for the past year, as identified in "Hot 100" List in the *Billboard* issues dated August 25, 2001, through August 25, 2002. ***Every singe Top 10 recording for the past year was available for download on the FastTrack network through the Grokster system and on the MusicCity system.***

- *The Diamond® Awards List*: For over forty years, the RIAA has provided the recording industry with certain certified calculations of musical product shipments (by units shipped), denoting the popularity of a given work. That endeavor culminated in an awards program that certifies certain categories by unit sales. In 1999, the RIAA launched the Diamond® Awards, which recognizes recordings where at least 10,000,000 units were shipped for public consumption. (Additional information about the RIAA's certification program is available on its website, located at

www.riaa.com.) At least one recording from every album ever certified Diamond® (as of August 2002) has been made available for downloading on the FastTrack network through the Grokster system and on the MusicCity system.

Virtually all of the copyrights in the above-referenced recordings on the Billboard "Hot 100" List and the Diamond® Awards List are owned or controlled by one of the moving Plaintiff recording companies, none of whom I understand has authorized the release of these works on defendants' systems.

28. Periodically since August 2001, we also have downloaded from defendants' systems sound recordings yet to be released to the public by the copyright owners. Attached as Exhibit 23 to this declaration is a list of the pre-release works we downloaded from defendants' systems.

File Identification Technology

29. During the course of my duties for the RIAA, I have become aware of numerous companies that are in the business of media identification and classification technology and that provide technology that can identify the content of digital files containing sound recordings or other audio data. Such companies often give the presentations of their technology to the RIAA. Three such companies – Audible Magic, Relatable, and Gracenote – have filed declarations in connection with this motion. I am aware of at least the following additional companies who have informed the RIAA that they provide file identification technology: Copyright Solutions, Fraundhoffer IIS-A, Mood Logic, and Wippit.

30. To my knowledge, defendants have not employed any of these companies to implement file identification technology on their systems.

31. In September 2001, I directed individuals working under my supervision to copy fully all then available pages of the musiccity.com web site, going as far back in time as possible. That copy was put on a computer hard drive that I later caused to be delivered to Mitchell Silberberg & Knupp LLP, counsel for the record company plaintiffs, for review.

32. In September 2001, I directed individuals working under my supervision to download various files owned by the plaintiffs in this action from the FastTrack network through the Grokster system. A list of these files is attached hereto as Exhibit 24.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on September 9, 2002, at Washington, DC.

/s/

Frank Creighton

Exhibit 18

Date Searched	Work Title	Results
	24 Complaint Songs	
2/8/2002	Sarah McLachlan - Adia	110
2/8/2002	Uncle Kracker - Follow Me	112
2/8/2002	Sugar Ray - Every Morning	112
2/8/2002	112 - Only You	109
2/8/2002	Faith Evans - Never Gonna Let You Go	49
2/8/2002	Keith Urban - Where the Blacktop Ends	107
2/8/2002	Cyndi Thompson - What I Really Meant to Say	104
2/8/2002	Tracy Chapman - Fast Car	107
2/8/2002	Smash Mouth - Walking on the Sun	109
2/8/2002	Jennifer Lopez - I'm Real	140
2/8/2002	Incubus - Drive	115
2/8/2002	Lil Bow Wow - Ghetto Girls	86
2/8/2002	Michael Jackson - You Rock My World	126
2/8/2002	Eve 6 - Here's To the Night	112
2/8/2002	Dave Matthews Band - The Space Between	119
2/8/2002	Nelly - Ride Wit Me	108
2/8/2002	Lee Ann Womack - Why they Call It Falling	87
2/8/2002	Mariah Carey f/ Cameo - Loverboy	114
2/8/2002	Blur - There's No Other Way	30
2/8/2002	Janet Jackson - Someone to Call My Lover	115
2/8/2002	Goo Goo Dolls - Naked	57
2/8/2002	Britney Spears - Sometimes	110
2/8/2002	N'Sync - Pop	112

2/8/2002	R Kelly - Fiesta	129
	SoundScan Hot 100 Singles Feb. 3, 2001	
2/8/2002	Usher - U Got It Bad	119
2/8/2002	Nickleback - How You Remind Me	115
2/8/2002	Ja Rule - Always on Time	136
2/8/2002	Jennifer Lopez - Ain't It Funny	110
2/8/2002	Linkin Park - In the End	120
2/8/2002	No Doubt - Hey Baby	119
2/8/2002	Creed - My Sacrifice	128
2/8/2002	The Calling - Whereever You Will Go	82
2/8/2002	Alicia Keys - A Woman's Worth	106
2/8/2002	Pink - Get the Party Stated	109
2/8/2002	Shakira - Whenever, Whereever	116
2/8/2002	Brandy - What About Us?	113
2/8/2002	Craig David - 7 Days	125
2/8/2002	Mary J. Blige - Family Affair	127
2/8/2002	Mary J. Blige - No More Drama	114
2/8/2002	Leann Rimes - Can't Fight the Moonlight	114
2/8/2002	Michael Jackson - Butterflies	108
2/8/2002	Enrique Iglesias - Hero	170
2/8/2002	Ludacris - Roll Out (My Business)	133
2/8/2002	Kylie Minogue - Can't Get You Out of My Head	65
2/8/2002	Puddle of Mudd - Blurry	106
2/8/2002	City High - Caramel	130
2/8/2002	Outkast - The Whole World	123
2/8/2002	Mr. Cheeks - Lights, Camera,	116

	Action!	
2/8/2002	Jewel - Standing Still	104
2/8/2002	Fat Joe - We Thuggin'	120
2/8/2002	Busta Rhymes - Break Ya Neck	109
2/8/2002	Aaliyah - Rock the Boat	109
2/8/2002	Five for Fighting - Superman (It's Not Easy)	120
2/8/2002	N'Sync - Gone	112
2/8/2002	Steve Holy - Good Morning Beautiful	107
2/8/2002	Ja Rule - Livin' It Up	119
2/8/2002	Keke Wyatt - Nothing In This World	106
2/8/2002	R. Kelly - The World's Greatest	107
2/8/2002	Ginuwine - Differences	113
2/8/2002	Brad Paisley - Wrapped Around	103
2/8/2002	Fabolous - Young'n (Holla Back)	114
2/8/2002	Tweet - Oops (On My)	109
2/8/2002	Alanis Morissette - Hands Clean	99
2/8/2002	Toya - I Do!!	114
2/8/2002	Brooks & Dunn - The Long Goodbye	108
2/8/2002	Train - Drops of Jupiter (Tell Me)	118
2/8/2002	Mystikal - Bouncin' Back (Bumpin' Me Again)	109
2/8/2002	Tim McGraw - The Cowboy In Me	103
2/8/2002	Jo Dee Messina - Bring On the Rain	109

2/8/2002	Staind - It's Been Awhile	110
2/8/2002	Alan Jackson - Where Were You	110
2/8/2002	B2K - Uh Huh	118
2/8/2002	Lifehouse - Hanging By a Moment	123
2/8/2002	Faith Evans - I Love You	104
2/8/2002	Jermaine Dupri - Welcome to Atlanta	115
2/8/2002	George Strait - Run	110
2/8/2002	Glenn Lewis - Don't You Forget It	104
2/8/2002	Nelly - #1	124
2/8/2002	N'Sync - Girlfriend	122
2/8/2002	Missy "Misdemeanor" Elliot - Take Away	106
2/8/2002	Martina McBride - Blessed	65
2/8/2002	Aaliyah - More Than a Woman	127
2/8/2002	Usher - U Don't Have to Call	101
2/8/2002	Aaron Tippin - Where the Stars and Stripes And the Eagle	56
2/8/2002	Dixie Chicks - Some Days You Gotta Dance	103
2/8/2002	Default - Wasting My Time	119
2/8/2002	Mobb Deep - Hey Luv (Anything)	118
2/8/2002	Kenny Chesney - Young	110
2/8/2002	Tracy Byrd - Just Let Me Be In Love	96
2/8/2002	Toby Keith - I Wanna Talk About Me	108
2/8/2002	P.O.D. - Youth of the Nation	108
2/8/2002	Fat Joe - What's Luv?	103
2/8/2002	Chris Cagle - I Breathe In, I Breathe Out	104

2/8/2002	Joe Diffie - In Another World	73
2/8/2002	P.O.D. - Alive	113
2/8/2002	Rascal Flatts - I'm Movin' On	80
2/8/2002	Jay-Z - Jigga	119
2/8/2002	Corey - Hush Lil' Lady	103
2/8/2002	Angie Stone - Brotha	110
2/8/2002	Jonell & Method Man - Round and Round	107
2/8/2002	Ashanti - Foolish	106
2/8/2002	Garth Brooks - Wrapped Up in You	111
2/8/2002	Lenny Kravitz - Dig In	103
2/8/2002	The Offspring - Defy You	107
2/8/2002	System of a Down - Chop Suey	116
2/8/2002	Trace Adkins - I'm Tryin'	103
2/8/2002	Joe- Let's Stay Home Tonight	104
2/8/2002	Jagged Edge - Goodbye	115
2/8/2002	Backstreet Boys - Drowing	107
2/8/2002	Method Man & Redman - Part II	109
2/8/2002	Master P - OOOHHHWEE	106
2/8/2002	DMX - I Miss You	110
2/8/2002	David Ball - Riding With Private Malone	108
2/8/2002	Nas - Got Ur Self A …	111
2/8/2002	Puddle of Mudd - Control	125
2/8/2002	Juvenile - From Her Mama (Mama Got A**)	103
2/8/2002	Amanda Perez - Never	66
2/8/2002	Ludacris - Saturday (OOOH! OOOOH!)	107
2/8/2002	IIO - Rapture (Tastes So Sweet)	116
2/8/2002	Kevin Denney - That's Just Jessie	6

2/8/2002	Ludacris, LL Cook J - Fatty Girl	116
2/8/2002	Sharissa - Any Other Night	19
2/8/2002	Faith Evans - You Gets No Love	79

Exhibit 19

Date Searched	Work Title	Results
	Shakespeare's Major Works:	
2/9/2002	Hamlet	0
2/9/2002	Romeo & Juliet	0
2/9/2002	The Tempest	0
2/9/2002	Macbeth	0
2/9/2002	A Midsummer Night's Dream	0
2/9/2002	Taming of the Shrew	0
2/9/2002	Much Ado About Nothing	0
2/9/2002	Richard III	0
2/9/2002	Henry VIII	0
2/9/2002	Titus Andronicus	0
2/9/2002	Love's Labour's Lost	0
2/9/2002	The Two Gentlemen of Verona	0
2/9/2002	The Merry Wives of Windsor	0
2/9/2002	Measure for Measure	0
2/9/2002	Comedy of Errors	0
2/9/2002	The Merchant of Venice	0
2/9/2002	As You Like It	0
2/9/2002	All's Well That Ends Well	0
2/9/2002	Twelfth Night	0
2/9/2002	Pericles, Prince of Tyre	0
2/9/2002	The Winter's Tale	0
2/9/2002	King John	0
2/9/2002	King Richard II	0
2/9/2002	1 King Henry IV	0
2/9/2002	2 King Henry IV	0
2/9/2002	King Henry V	1
2/9/2002	1 King Henry VI	0
2/9/2002	2 King Henry VI	0

2/9/2002	3 King Henry VI	0
2/9/2002	Coriolanus	0
2/9/2002	Timon of Athens	0
2/9/2002	Julius Caesar	0
2/9/2002	King Lear	0
2/9/2002	Othello	0
2/9/2002	Antony and Cleopatra	0
2/9/2002	Cymbeline	0
2/9/2002	Troilus and Cressida	0
2/9/2002	King James Bible	1
2/9/2002	Koran	2
2/9/2002	Moby Dick	0
2/9/2002	The Rights of Man	0
2/9/2002	The Federalist Papers	0
2/9/2002	NAFTA Treaty	0

Date Searched	Work Title	Results
	Jane Austen Novels:	
2/9/2002	Persuasion	0
2/9/2002	Emma	0
2/9/2002	Pride and Prejudice	0
2/9/2002	Sense and Sensibility	0
2/9/2002	Northanger Abbey	0
2/9/2002	Lady Susan	0
2/9/2002	Mansfield Park	0
2/9/2002	Juvenilia	0
2/9/2002	The Watsons	0
	Upton Sinclair Works:	
2/9/2002	The Jungle	0
2/9/2002	I, Candidate For Governor: And How I Got Licked	
2/9/2002	Oil!	
2/9/2002	Manassas: A Novel Of The Civil War	

2/9/2002	Millennium: A Comedy Of The Year 2000	0
2/9/2002	Love's Pilgrimage	0
2/9/2002	Manassas: Revised As Theirs Be the Guilt	0
2/9/2002	Metropolis	0
2/9/2002	Moneychangers	0
2/9/2002	Springtime and Harvest	0
2/9/2002	Return of Lanny Budd	0
2/9/2002	The Profits of Religion	0
2/9/2002	Boston: A Documentary Novel of the Sacco-Vanzetti	0
2/9/2002	Upton Sinclair Presents William Fox	0
2/9/2002	Sylvia	0
2/9/2002	Plays of Protest	0
2/9/2002	Little Steel	0
2/9/2002	The Brass Check	0
2/9/2002	Prince Hagen	0
2/9/2002	Money Writes!	0
2/9/2002	American Outpost: A Book of Reminiscences	0
2/9/2002	The EPIC Plan for California	0
2/9/2002	King Coal	0
2/9/2002	Art for Social Justice	0
2/9/2002	Captain of Industry	0
2/9/2002	Coal War	0
2/9/2002	Mammonart	0
2/9/2002	Johann Wolfgang von Goethe	0
2/9/2002	The Sorrows of Young Werther	0
2/9/2002	Faust	0
2/9/2002	The Elective Affinities	0
2/9/2002	Reynard the Fox	0

2/9/2002	Novelle	0
2/9/2002	The Diary	0
2/9/2002	Divan of West and East	0
2/9/2002	Roman Elegies	0

Date Searched	Work Title	Results
2/9/2002	On Byron's Manfred	0
2/9/2002	Goethe on Renunciation	0
2/9/2002	Prime Numbers	0
	CIA World Fact Books:	
2/9/2002	1990	0
2/9/2002	1991	0
2/9/2002	1992	0
2/9/2002	1993	0
2/9/2002	1994	0
2/9/2002	1995	0
2/9/2002	1996	0
2/9/2002	1997	0
2/9/2002	1998	0
2/9/2002	1999	0
2/9/2002	2000	0
2/9/2002	Caesar's Commentaries	0
2/9/2002	Adam Smith - The Wealth of Nations	0
2/9/2002	The Human Genome Project, ATCG Codes	0
2/9/2002	Theodore Roosevelt: An Autobiography	0
2/9/2002	Karl Marx & Friedrich Engles - The Communist	1
	Louisa May Alcott:	
2/9/2002	Bandit's Bride	0
2/9/2002	Bianca	0
2/9/2002	The Captive of Castile	0

2/9/2002	The Greek Slave	0
2/9/2002	Ion	0
2/9/2002	Nat Bachelor's Pleasure Trip	0
2/9/2002	Noma	0
2/9/2002	The Prince and the Peasant	0
2/9/2002	The Rival Prima Donnas	0
2/9/2002	The Unloved Wife	0
2/9/2002	Diana and Persis	0
2/9/2002	Eight Cousins	0
2/9/2002	Genesis	0
2/9/2002	Hospital Sketches	0
2/9/2002	The Inheritance	0
2/9/2002	Jack and Jill	0
2/9/2002	Jo's Boys, and How They Turned Out	0
2/9/2002	Little Men	0
2/9/2002	Little Women	0
2/9/2002	Good Wives	0
2/9/2002	A Long Fatal Love Chase	0
2/9/2002	A Modern Mephistopheles	0
2/9/2002	Moods	0
2/9/2002	An Old-Fashioned Girl	0
2/9/2002	Rose in Bloom	0
2/9/2002	Under the Lilacs	0
2/9/2002	Work (or, Success)	0
2/9/2002	John Milton - Aeropagitica	0
2/9/2002	F. Scott Fitzgerald - This Side of Paradise	0

Date Searched	Work Title	Results
2/9/2002	Alexis de Toqueville - Democracy in America	0
	Gilbert and Sullivan:	
2/9/2002	Thespis	0

2/9/2002	Trial By Jury	0
2/9/2002	H.M.S. Pinafore	0
2/9/2002	The Pirates of Penzance	0
2/9/2002	Patience	0
2/9/2002	Iolanthe	0
2/9/2002	Princess Ida	0
2/9/2002	The Mikado	0
2/9/2002	Ruddigore	0
2/9/2002	The Yeoman of the Guard	0
2/9/2002	The Gondoliers	0
2/9/2002	Utopia Unlimited	0
2/9/2002	The Grand Duke	0
2/9/2002	Popular Science Monthly from 1915	0
2/9/2002	Dante Alighiere - The Divine Comedy	0
2/9/2002	Ulysses S. Grant - Personal Memoirs	0
2/9/2002	Charles Darwin - Origin of Species	0
	Plato:	
2/9/2002	Alcibiades	0
2/9/2002	Lysis	0
2/9/2002	Laches	0
2/9/2002	Charmides	0
2/9/2002	Protagoras	0
2/9/2002	Hippias Major	0
2/9/2002	Gorgias	1
2/9/2002	Hippias Minor	0
2/9/2002	Meno	0
2/9/2002	Euthyphro	0
2/9/2002	The Apology of Socrates	0
2/9/2002	Crito	1
2/9/2002	The Symposium	1
2/9/2002	Phaedrus	0

2/9/2002	The Republic	1
2/9/2002	Phaedo	0
2/9/2002	Cratylus	0
2/9/2002	Ion	0
2/9/2002	Eurthydemus	0
2/9/2002	Menexenus	0
2/9/2002	Parmenides	0
2/9/2002	Theaetetus	0
2/9/2002	The Sophist	0
2/9/2002	The Statesman	0
2/9/2002	Philebus	0
2/9/2002	Timaeus	0
2/9/2002	Critias	0
2/9/2002	The Laws	0
2/9/2002	Immanual Kant - The Critique of Pure Reason	0

Date Searched	Work Title	Results
2/9/2002	Dante's Inferno	0
	Johann Wolfgang von Goethe:	0
2/9/2002	Egmont	0
2/9/2002	Novelle	0
2/9/2002	CIA World Factbook 2000	0
2/9/2002	winzip81	32

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF DAVID HYMAN IN SUPPORT OF MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT ON LIABILITY

I, David Hyman, the undersigned, declare:

1. I am the Chief Executive Officer of Gracenote. I make this declaration in support of Plaintiffs' Motion for Summary Judgment on Liability, to demonstrate that, contrary to defendants' public statements, methods have existed since the time that defendants began operating to block unauthorized recordings from being distributed over peer-to-peer systems. I have personal knowledge of the following facts and, if called and sworn as a witness, could competently testify thereto.

2. Gracenote started in 1995, as the developer of a product called CDDB, an Internet-based service that recognizes and identifies digital audio recordings (by analyzing the data in the recording) and associates certain identifying "metadata" with the recording. (Metadata is data that describes other data; in this case, it refers to information that describes a digital recording, such as track title, artist, and album.) Thus, if a person has a digital recording and wants to know the title and artist, he or she can identify the

recording by accessing the CDDB service and database. CDDB in effect "listens" to the recording and decides if it matches a recording in the database. If there is a match, CDDB retrieves the metadata associated in the database with the recording and returns that identifying information to the application and user who requested the digital audio recording be identified.

3. Gracenote's CDDB Music Recognition Service is now the industry standard, and is the largest online database of audio CD and song titles in the world, with over 1,500,000 albums and 19 million track entries. More than 28 million users access the service each month. Leading software and hardware developers, such as AOL/Winamp, Apple, Kenwood, Pioneer, RealNetworks, and Creative Labs, license CDDB for use in their applications and products.

4. As the leading supplier of technology and real-time Internet-based music identification services, Gracenote has developed technology that can be adapted to create a filtering service for a peer-to-peer ("P2P") digital audio trading system, such as those operated by defendants in this case, which would block unauthorized recordings from being distributed over the system. In fact, in February 2002, Gracenote offered its services to Music City, but Music City declined. Attached hereto as Exhibit 1 is a true and correct copy of a series of e-mails between Gracenote and Music City on this subject.

5. In the course of my work at Gracenote, I have become generally familiar with P2P systems and how they work. Using a combination of unique identifiers, text matching, and audio fingerprinting techniques, in conjunction with the vast CDDB database, Gracenote has the proven ability to deploy systems and services for P2P networks.

6. Gracenote technology can be used along with a reference database that has been populated through the

submission of Title/Artist pairings by labels, publishers, and other content owners for those files authorized for distribution in the P2P system. This database will have been created by Gracenote assigning an identifier (ID) to each of the recordings submitted by the content owners.

7. In a P2P system, Gracenote's technology would identify the digital recording being offered for distribution by a P2P user, and assign it a unique ID. Gracenote technology distinguishes recordings from each other; it is so discriminating that it can distinguish between live and studio recordings of the same song by the same artist, while simultaneously identifying the name of the artist and the albums on which the different recordings appeared. The technology will work to identify recordings in all the most popular formats that are used to encode digital audio files, including MP3. If the ID of the user's file is present in the reference database, the file may be distributed. If the ID is not present in the database, the file is blocked. This filtering method is commonly known as a "filter-in" system. It is as if the user has asked the content owner for permission to distribute the recording through the P2P system, and is allowed to do so only if the content owner gives permission, by having submitted the recording for inclusion in the reference database.

8. Gracenote technology can also be used to create a "filter-out" system, simply by building a different reference database and reversing the final instructions in the identification process. In other words, Gracenote would identify and assign an ID to the unknown files in the manner described above. However, the reference database would include IDs for recordings that are not authorized for distribution on the P2P system, and a user's file could be distributed only if the ID for the user's file was not present in

the database. If the ID for the user's file is present in the reference database, the file would be blocked.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 5, 2002, at Berkeley, California.

/s/

David Hyman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF VANCE IKEZOYE IN SUPPORT OF MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT ON LIABILITY

I, Vance Ikezoye, the undersigned, declare:

1. I am the President and Chief Executive Officer of Audible Magic Corporation. I make this declaration in support of Plaintiffs' Motion for Summary Judgment on Liability, to demonstrate that, contrary to the public statements by defendants, there are methods presently available to prevent unauthorized recordings from being distributed on peer-to-peer systems like those operated by defendants. I have personal knowledge of the following facts and, if called and sworn as a witness, could competently testify thereto.

2. Audible Magic is a technology and services company that provides content management and information services to the media and entertainment industries. The company offers a range of standard information services as well as customized project development based upon its patented media identification and classification technology, its media monitoring and management software, and an extensive and continually updated reference database of copyrighted music.

One of the services Audible Magic currently provides is monitoring radio broadcasts for customers such as SESAC, a major performing rights organization. Audible Magic is using its fingerprinting technology (described more fully below) to identify the songs broadcast by terrestrial radio stations, to assist in determining royalty distributions to artists. Audible Magic also utilizes its fingerprinting technology in a song copyright verification service to the CD replication industry (companies that duplicate CDs) to enable them to identify copyrighted recordings prior to reproduction. The replicators then utilize this information to ensure that the customer has authorization from the copyright holders to copy the recordings.

3. The core of Audible Magic's work is audio recognition technology that classifies sound based on its perceptual characteristics. A company called Muscle Fish, LLC, which began in 1992 and which Audible Magic acquired in July 2000, originally developed the technology. This technology relies on Mel-Filtered Cepstral Coefficients ("MFCCs"), which are measurements that accurately characterize and model audio in the same way the ear perceives sound. When a person hears any sound, the human ear perceives the spectra of the sound. (A spectrum measures amplitude as a function of frequency.) We have found that measuring the shape of the spectrum is the method of identifying uniqueness in a segment of audio that is the most accurate and robust, i.e., able to work in many different environments and despite changes in format and acoustic and digital modifications. Thus, Audible Magic's technology analyzes the shape of the spectrum inherent in a digital audio file. The MFCC describes the shape of that spectrum, adjusted for the way that the human ear actually perceives sound.

4. The analysis performed by this technology produces a set of numeric values called a "feature vector" or "digital fingerprint," which is absolutely unique to a particular master recording. In essence, each digital fingerprint identifies a master recording, much as a human fingerprint identifies a person. The fingerprinting technology works on all forms of audio, regardless of the digital format into which the audio has been encoded.

5. The fingerprint remains constant through typical audio processing, such as the compression that occurs when an audio file is encoded into digital formats, including MP3, the most popular format. Thus, one fingerprint can be used to recognize all manipulated forms of the original audio, just as law enforcement technology permits identification of a suspect even if a fingerprint is smeared. The fingerprints are accurate enough that they can differentiate between various live and studio performances of a single song.

6. Audible Magic's technology also accurately identifies songs regardless of the bit rate of the file. The bit rate is the number of bits (small pieces of data) that occur in a given amount of time, usually a second. Thus, a bit rate is usually expressed in some multiple of bits per second - for example, kilobits, or thousands of bits per second (Kbps). The higher the bit rate, the larger the file and the better the sound quality. Users can set the bit rate at several different levels, but the identification technology will work in a range of bit rates from highly compressed 20 Kbps to CD quality, over 300 Kbps. This range includes the bit rates used by regular users of P2P services, who generally prefer the higher quality that comes with higher bit rates, usually at least 56 Kbps and more often much higher.

7. The fingerprints are very small. Only 20 seconds of a master recording is needed to create the fingerprint. A typical reference fingerprint is around one kilobyte (1 Kb),

whereas a typical file encoded in MP3, the most popular digital format for sound recordings, is about three megabytes (3Mb), 3,000 times larger than the fingerprint, and a typical WAV file (another popular digital format for sound recordings) is about 30 megabytes (30 Mb), 30,000 times larger than the fingerprint. The small size of the fingerprint makes it much easier to store and much faster to transmit and check the fingerprints of unknown audio files against a reference database of fingerprints of known recordings.

8. The fingerprint technology is very secure and cannot be tampered with. As long as the audio is not distorted to the point that the listening experience is significantly affected, the fingerprint will positively identify the recording.

9. I am familiar with peer-to-peer systems ("P2P") like the ones operated by defendants in this case. We understand the basic technology and architectures; and have discussed designs to apply Audible Magic's technology to P2P. Audible Magic's technology can be used to block unauthorized recordings from being distributed and copied in this type of system, as described below.

10. First, Audible Magic possesses a database of fingerprints from approximately 3.4 million copyrighted songs. This database roughly represents the music available for purchase in North America and consists of music from the five major and over 500 independent music labels. Fingerprints from this large archive would be used to populate an Audible Magic Identification Server with a reference database. Then, the company's fingerprinting software would be installed either on each user's computer or on a server operated by the system operator (e.g., Grokster or KaZaA). In either case, the fingerprinting technology would create a fingerprint of each digital recording that a user sought to distribute and transmit it over the Internet to the reference database, located on the Audible Magic

Identification Server. The unknown fingerprint is then compared to the fingerprints in the reference database.

11. What happens next depends on whether the system is designed as a "filter-in" system or a "filter-out" system. In a "filter-in" system, the reference database would include fingerprints of only those recordings that the copyright holders have authorized for distribution. In that case, if the fingerprint of the unknown audio file matches a fingerprint in the reference database, the user would be permitted to distribute and copy the audio file, but would be blocked from distributing it if there is no match. (The blocking could occur by disabling the unauthorized file on the user's hard drive.) If a "filter-out" system was desired, the reference database would include fingerprints of those recordings that are not authorized for distribution, and a match would prevent distribution, while no match would permit distribution.

12. The Audible Magic technology can easily handle millions of requests for identification against a reference database of hundreds of thousands of recordings. Audible Magic's technology currently achieves above 98% correct identification rates, with an insignificant level of false positive identifications. Our goal, which we are continually working towards, is 100% correct identification. In addition, when combined with other file identification methods such as MD5 hashes, a comprehensive system would make the entire verification even faster, more accurate, and less expensive.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on September 5, 2002, at Los Gatos, California.

/s/

Vance Ikezoye

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF KEN JACOBSEN IN SUPPORT OF MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT ON LIABILITY VOLUME 1 OF 4

I, KEN JACOBSEN, the undersigned, declare:

1. I am the Senior Vice President and Director, Worldwide Anti-Piracy, at the Motion Picture Association of America ("MPAA"). I submit this declaration in support of plaintiffs' joint motions for summary judgment against defendants MusicCity.com, Inc. (now known as StreamCast Networks, Inc.) and MusicCity Networks, Inc. (collectively referred to herein as "MusicCity"), Kazaa BV (formerly known as Consumer Empowerment BV) (referred to herein as "Kazaa"), and Grokster, Ltd. I have personal, first-hand knowledge of the facts set forth in this declaration, except for facts that are stated on information and belief.

2. United States films are shown in more than 150 countries worldwide and American television programs are broadcast in over 125 international markets. The United States film industry provides the majority of prerecorded cassettes seen in millions of homes throughout world. This complex audiovisual industry has been represented globally by the Motion Picture Association ("MPA") since 1945. Its

sister organization, the MPAA, was founded in 1922 and is the trade association of the American motion picture industry.

3. MPAA members and their affiliates own or control the rights to a substantial portion of the major motion pictures produced or distributed in the United States. In my role as Senior Vice President and Director, Worldwide Anti-Piracy, I am responsible for overseeing and directing worldwide copyright enforcement activities on behalf of the MPAA's member companies. My responsibilities include, among other things, design, implementation, and execution of strategies to protect MPAA member companies' audiovisual products from copyright infringement in over 60 countries worldwide.

4. On October 2, 2001, eight member companies of the MPAA, along with a number of recording companies, filed a complaint against Grokster, MusicCity, and Kazaa (collectively, the "Defendants") in this action.

5. This complaint alleged that the Defendants were liable for a vast number of copyright infringements, including infringements of the copyright in motion pictures listed in an exhibit thereto. The infringed motion pictures expressly listed in the exhibit to the complaint were "Final Fantasy," "A Knight's Tale," "The Princess Diaries," "Jeepers Creepers," "Hannibal," "Legally Blonde," "Rush Hour," "Rat Race," "Tomb Raider," "The Truman Show," "Exit Wounds," "Moulin Rouge," "Planet of the Apes," and "American Pie 2."

6. At my direction and under my supervision, Mr. Hemanshu Nigam, then the MPA's Vice President and Director for Worldwide Internet Enforcement, sent several notices to the defendants in this action regarding copyright infringement of our members' motion pictures and television

programs that was occurring via their systems. (Mr. Nigam now works at Microsoft Corporation.)

7. On or about November 30, 2001, Mr. Nigam sent a letter to Mr. Steve Griffin of MusicCity detailing a small sampling of the infringement of MPAA members' copyrights occurring via MusicCity's Morpheus system. This letter made clear that MusicCity is promoting and facilitating systematic copyright infringement on a massive scale, and demanded that such activity cease. Attached to this letter were two infringement reports detailing in total over 1,500 copyrighted audiovisual works owned or controlled by MPAA member companies or their affiliates that were found to be available for copying (downloading) and distribution on the MusicCity network. The letter and infringement reports were sent electronically and by express courier under cover of a letter to MusicCity's then-counsel of record, Mr. Andrew Bridges of Wilson Sonsini Goodrich & Rosati. True and correct copies of this cover letter, the letter to Mr. Griffin and the infringement reports are attached as Exhibit 1 to this Declaration.

8. Mr. Nigam sent similar cover letters to Mr. Bridgers, each accompanied by a cease and desist letter to MusicCity and a report detailing recent infringements, on December 7, 2001, December 14, 2001, December 20, 2001, January 8, 2002, January 9, 2002, January 14, 2002, January 18, 2002, January 25, 2002, January 31, 2002, February 8, 2002, February 15, 2002, and February 22, 2002. By way of example, attached as Exhibit 2 are true and correct copies of the cover letter, cease and desist letter and infringement report dated January 18, 2002, and attached as Exhibit 3 are true and correct copies of the cover letter, cease and desist letter and infringement report dated February 8, 2002.

9. Despite these letters and reports, MusicCity failed to keep the infringing files from being available on the

network. For example, the infringement report attached as part of Exhibit 2 and dated January 18, 2002 details 1,152 copyrighted audiovisual works owned or controlled by MPAA member companies found to be available for copying (downloading) and distribution on the MusicCity network. These titles include motion pictures in theatrical release at that time such as "Black Hawk Down" and "Ali." These titles also include that following motion pictures that were still readily available in the sampling period despite their being listed in the complaint months earlier: "Final Fantasy," "A Knight's Tale," "The Princess Diaries," "Jeepers Creepers," "Hannibal," "Legally Blonde," "Rush Hour," "The Rat Race," "Tomb Raider," "Exit Wounds," "Moulin Rouge," "Planet of the Apes," and "American Pie 2."

10. By way of further example, the infringement report attached as part of Exhibit 3 and dated February 8, 2002 details 2,248 copyrighted audiovisual works owned or controlled by MPAA member companies found to be available for copying (downloading) and distribution on the MusicCity network. These titles include motion pictures in theatrical release at that time such as "Snow Dogs" and "Kung Pow: Enter The Fist." These titles also include the following motion pictures that were still readily available in the notice period despite their being listed in the complaint months earlier: "A Knight's Tale," "The Princess Diaries," "Jeepers Creepers," "Hannibal," "Legally Blonde," "Rush Hour," "The Rat Race," "Tomb Raider," "The Truman Show," "Exit Wounds," "Moulin Rouge," "Planet of the Apes," and "American Pie 2."

11. On or about November 30, 2001, Mr. Nigam also sent a letter to Mr. Nikls Zennström of Kazaa detailing a small sampling of the infringement of MPAA members' copyrights occurring via Kazaa's system. This letter made clear that Kazaa is promoting and facilitating systematic

copyright infringement on a massive scale, and demanded that such activity cease. Attached to this letter were two infringement reports detailing in total over 1,600 copyrighted audiovisual works owned or controlled by MPAA member companies or their affiliates that were found to be available for copying (downloading) and distribution on the Kazaa network. The letter and infringement reports were sent electronically and by express courier under cover of a letter to Kazaa's counsel of record, Ms. Judith B. Jennison of Perkins Coie LLP. True and correct copies of this cover letter, the letter to Mr. Zennström and the infringement reports are attached as Exhibit 4 to this Declaration.

12. Mr. Nigam sent similar cover letters to Ms. Jennison, each accompanied by a cease and desist letter to Kazaa and a report detailing recent infringements, on December 7, 2001, December 14, 2001, December 20, 2001, January 8, 2002, January 9, 2002, January 14, 2002, January 18, 2002, January 25, 2002, January 31, 2002, February 8, 2002. By way of example, attached as Exhibit 5 are true and correct copies of the cover letter, cease and desist letter and infringement report dated January 18, 2002, and attached as Exhibit 6 are true and correct copies of the cover letter, cease and desist letter and infringement report dated February 8, 2002.

13. Despite these letters and reports, Kazaa failed to keep the infringing files from being available on the network. For example, the infringement report attached as part of Exhibit 5 and dated January 18, 2002 details 501 copyrighted audiovisual works owned or controlled by MPAA member companies found to be available for copying (downloading) and distribution on the Kazaa network. These titles include motion pictures in theatrical release at that time such as "Black Hawk Down" and "Ali." These titles also include the following motion pictures that were still readily

available in the sampling period despite their being listed in the complaint months earlier: "A Knight's Tale," "The Princess Diaries," "Jeepers Creepers," "Hannibal," "Legally Blonde," "Rush Hour," "The Rat Race," "Tomb Raider," "Exit Wounds," "Moulin Rouge," "Planet of the Apes," and "American Pie 2."

14. By way of further example, the infringement report attached as part of Exhibit 6 and dated February 8, 2002 details two dozen copyrighted audiovisual works owned or controlled by MPAA member companies found to be available for copying (downloading) and distribution on the Kazaa network. These titles include motion pictures in theatrical release at that time such as "Black Hawk Down" and "Ocean's Eleven." These titles also include the following motion pictures that were still readily available in the notice period despite their being listed in the infringement reports sent to Kazaa months earlier: "The Rat Race," "Rush Hour II," "Scary Movie II," "Swordfish," "Kiss of the Dragon," "Tomb Raider," "Billy Madison," "Dogma," and "American Pie 2."

15. On or about November 30, 2001, Mr. Nigam also sent a letter to Mr. R. Eugene Herbert of Grokster detailing a small sampling of the infringement of MPAA members' copyrights occurring via Grokster's system. This letter made clear that Grokster is promoting and facilitating systematic copyright infringement on a massive scale, and demanded that such activity cease. Attached to this letter was an infringement report detailing several dozen copyrighted audiovisual works owned or controlled by MPAA member companies or their affiliates that were found to be available for copying (downloading) and distribution on the Grokster network. The letter and infringement reports were sent electronically and by express courier under cover of a letter to Grokster's counsel of record, Mr. Michael Page

of Keker & Van Nest, LLP. True and correct copies of this cover letter, the letter to Mr. Herbert and the infringement reports are attached as Exhibit 7 to this Declaration.

16. Mr. Nigam sent similar cover letters to Mr. Page, each accompanied by a cease and desist letter to Grokster and a report detailing recent infringements, on December 7, 2001, December 14, 2001, December 20, 2001, January 8, 2002, January 9, 2002, January 14, 2002, January 18, 2002, January 25, 2002, January 31, 2002 and February 8, 2002. By way of example, attached as Exhibit 8 are true and correct copies of the cover letter, cease and desist letter and infringement report dated January 18, 2002, and attached as Exhibit 9 are true and correct copies of the cover letter, cease and desist letter and infringement report dated February 8, 2002.

17. Despite these letters and reports, Grokster failed to keep the infringing files from being available on the network. For example, the infringement report attached as part of Exhibit 8 and dated January 18, 2002 details numerous copyrighted audiovisual works owned or controlled by MPAA member companies found to be available for copying (downloading) and distribution on the Grokster network. These titles include motion pictures in theatrical release at that time such as "Vanilla Sky" and "Ali." These titles also include the following motion pictures that were still readily available in the sampling period despite their being listed in the infringement report sent to Grokster months earlier: "A.I. Artificial Intelligence," "Crouching Tiger Hidden Dragon," "Doctor Dolittle 2," "Legally Blonde," "Rush Hour II," "Tomb Raider," "Planet of the Apes," and "American Pie 2."

18. By way of further example, the infringement report attached as part of Exhibit 9 and dated February 8, 2002 details dozens of copyrighted audiovisual works owned

or controlled by MPAA member companies found to be available for copying (downloading) and distribution on the Grokster network. These titles include such then-recently released motion pictures as "Snow Dogs" and "Ocean's Eleven." These titles also include the following motion pictures that were still readily available in the notice period despite their being listed in the infringement report sent to Grokster months earlier: "The Fast and the Furious," "Monsters, Inc.," "Pearl Harbor," "The Sixth Sense," "Swordfish," "Legally Blonde," "Exit Wounds," and "American Pie 2."

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on September 5, 2002, at Los Angeles, California.

/s/

Ken Jacobsen

UNITED STATES [illegible]CT COURT
CENTRAL DISTRI[illegible]CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Sept. 9, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

DECLARATION OF PROF. LEONARD KLEINROCK IN SUPPORT OF MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT ON LIABILITY

I, LEONARD KLEINROCK, the undersigned, declare:

1. I have been retained by plaintiffs as an expert in these consolidated actions. I make this declaration in support of plaintiffs' joint motions for summary judgment against defendants MusicCity.com, Inc. (now known as StreamCast Networks, Inc.) and MusicCity Networks, Inc. (collectively referred to herein as "MusicCity"), Grokster, Ltd. ("Grokster"), and Kazaa BV ("Kazaa"). The observations and conclusions set forth below are based upon my specialized knowledge, education and experience regarding computer networking design and operational issues, as applied to the circumstances of this case, and are true and accurate to the best of my knowledge, information and belief.

2. In connection with this declaration, I have used the defendants' online systems, which enable the finding, copying, and distributing of digital files across a network of "peer" computers. (For shorthand, I will refer to these as "file-distribution systems," "systems" or "networks.") I also

have supervised and/or analyzed my colleagues' use and investigation of the systems. I also have reviewed documents that were produced by defendants in this litigation, pleadings filed or served by the parties, deposition transcripts, and publicly available information from the Internet and other sources. For ease of reference, some of these sources are cited in the body of this declaration.

3. My analysis of defendants' systems leads to the following conclusions, which are discussed in detail below:

a) From the perspective of a user seeking to find, copy, and/or distribute digital files, the systems that defendants have provided are quite similar to the well-known Napster "file sharing" system. Like Napster, defendants' systems have given computer users access to the hard drives of thousands (or more) other users simultaneously connected to a computer network, and have provided the means to easily search for, download (*i.e.*, copy), and upload (*i.e.*, distribute) media files the user is seeking.[1]

b) Defendants have provided the technical means, and ongoing support, to materially facilitate their users' distribution and copying of unauthorized copies of copyrighted works owned by plaintiffs and others. In addition to providing the facilities for copying and distribution, some defendants have taken

[1] This declaration discusses both (1) the file-distribution systems of the defendants when they all operated on the "FastTrack" technology platform licensed by defendant Kazaa, and (2) the system of defendant MusicCity when it operated on the Gnutella technology platform after Kazaa apparently forcibly terminated MusicCity from FastTrack. With respect to the FastTrack-based systems, unless I specifically indicate otherwise, my reference to activities of "defendants" encompasses Kazaa, MusicCity, and Grokster collectively.

affirmative steps to impede the ability of copyright owners to combat infringements on the system.

c) Defendants have, and have exercised, the ability to control or supervise the activities of the users of their systems. For instance, defendants have controlled access to their networks: by taking action against individual users who have violated their rules; by blocking the IP addresses of computers; by blocking access to agents of copyright holders seeking to track copyright infringements on the networks; by changing the protocol and encryption of communications to prevent unauthorized connections to the networks; and even by making current users ineligible to continue accessing the networks until they accept a new version of defendants' software. Defendants, moreover, have had the technical capacity to identify their users and to identify the specific (as well as classes of) audio, video, and other files their users are copying or distributing. And defendants have implemented features to permit the filtering out of different types of files, although they have not to date filtered out files the copying or distribution of which would infringe copyrights.

d) Defendants maintain an ongoing relationship with their users. Unlike the manufacturer of a product, such as a videotape recorder (whose contact with a customer after the point of sale is limited or nonexistent), defendants maintain a persistent relationship with their users, involving numerous interactive communications and ongoing assistance regarding the user's finding, distributing and copying of files.

e) It is technically feasible for defendants to exercise their control over their systems to thwart

rather than promote infringement. There are many ways in which defendants could use mechanisms to help keep unauthorized content from being distributed while permitting the copying and distribution of works where the copyright owners consent to such use.

BACKGROUND AND QUALIFICATIONS

4. I am a professor in, and former Chair of, the University of California, Los Angeles Computer Science Department, where I have researched and taught since 1963. I often have been referred to as the inventor of Internet technology because I invented the technology that led to "packet switching," on which the Internet and other modern data networks are based. I created the basic principles of this technology while a graduate student at the Massachusetts Institute of Technology and developed those principles over the next several years. My areas of research, writing, and teaching include numerous aspects of computer network modeling, analysis, and design.

5. In 1968 the United States government called upon me to help prepare the functional specifications for the ARPANET, the government-supported data network that ultimately evolved into the Internet, and that would use the "packet switching" technology on which Internet communications are based. As part of my work on ARPANET, in 1969 our host computer at UCLA, under my supervision, became the first "node" of the Internet/ARPANET. Our computer sent the first Internet/ARPANET message to the second node at the Stanford Research Institute. Some Internet users may find it fitting that the very first message we attempted to send – "LOG IN" – could not be completely delivered because the Stanford host computer crashed after we transmitted the first two letters of the message, "L" and "O," thus creating the

first Internet message, "LO." The login was successful on the second attempt, however.

6. I am a 1951 graduate of the Bronx High School of Science. I received a Bachelor of Electrical Engineering degree from the City College of New York in 1957, a Masters degree in Electrical Engineering from the Massachusetts Institute of Technology in 1959, and a Ph.D. in Electrical Engineering from MIT in 1963. I have served as a professor in the UCLA Computer Science Department since 1963, and was Chair of the department from 1991 to 1995.

7. I have published six books and more than 225 professional papers, on subjects including computer networking, distributed computing, packet switching networks, packet radio networks, local area networks, broadband networks, gigabit networks, and nomadic computing. These include the first paper and the first book on the subject of modern data networks.

8. Among the companies I have founded are Nomadix, Inc., which develops software and hardware products for "nomadic computing" – the emerging technology to provide users with computer access in environments away from their homes and offices – and the wireless-communication company Linkabit Corporation.

9. Honors I have received include, among others, the CCNY Townsend Harris Medal, the CCNY Electrical Engineering Award, the Marconi Award, the L.M. Ericsson Prize, the UCLA Outstanding Teacher Award, the Lanchester Prize, the ACM SIGCOMM Award, the Sigma Xi Monie Ferst Award, the IEEE Harry Goode Award, the IEEE Internet Millennium Award, the NAE Charles Stark Draper Prize, and the Okawa Prize.

10. A more detailed listing of my background is found in the curriculum vitae attached hereto as Exhibit 1.

THE INTERNET, THE WEB AND FILE TRANSFER

11. The Internet is a global computer network made up of a multitude of component computer networks, each separately owned and operated. There is no single entity responsible for the collective network, which functions as a whole because the computers it connects use a common scheme, the "Internet Protocol" ("IP"), for communicating. Computers that communicate using this protocol refer to each other via numerical identifiers known as "IP addresses" and transmit data in units known as "IP packets."

12. This patchwork network of networks has grown organically over more than thirty years in a distributed, non-centralized fashion. Two computers that wish to communicate may be on two different networks separated by many intermediate networks, so that communications between them require multiple relaying of packets. This relaying is done on a so-called "best-effort" basis; there is no quality-of-service guarantee that a packet will reach its destination. Networks cooperate as equals, or peers, in routing traffic destined to and fro. This "peer-to-peer" design and best-effort quality of service result in flexibility and reliability in the face of network changes, such as computer and communication link failures or additions, varying traffic conditions, etc. They have been instrumental in the Internet's successful growth from our single computer at UCLA in 1969 to hundreds of millions of computers around the world today in 2002.

13. One of the most popular and familiar applications running on the Internet is the World Wide Web. The Web consists of "client" programs ("Web browsers") that run on user computers, "server" programs that run on heavier-duty computers dedicated to the task ("Web servers"), a language

for creating Web pages ("HTML"), and a protocol for transmitting them ("HTTP"). (As a general matter, a "client" refers to any computer program that makes a service request of another computer program, called a "server." The term "server" is also typically applied to central computers that run server programs to which numerous user computers, running client applications, connect for service, although smaller user computers can also act as servers.) Web servers fulfill requests of Web browsers for Web pages, and receive data posted back to them such as contents of online forms. Servers are generally in operation all day, every day, with high-speed connections to the Internet and fixed IP addresses. Clients are typically in operation only for certain periods, with lower-speed Internet connections and often have variable IP addresses. Most consumers connect to the Internet using "dial-up" modems; a sizeable minority have "broadband" connections (significantly faster than dial-up) over phone lines, cable TV systems, wireless connections, or through local area networks such as those found in college dormitories.

14. In the past, digital copies of audio files (such as recordings of songs) or audiovisual files (such as motion pictures or television programs), were so large – *i.e.*, they contained so much data – that it was generally neither easy nor practical for consumers to use their relatively limited storage capability and/or slow connections to the Internet to transfer such files from computer to computer. But advances in compression technology over the past decade, as well as increases in the availability of broadband connections, have enabled files containing sound and audiovisual files of satisfactory playback quality to be transferred in a reasonably small amount of time. One of the most popular compression technologies is the MP3 format, the most widely used format for digital audio files available on the Internet. Popular video formats include MPEG and DivX.

15. As the ability to compress and send digital files increased, so did efforts by many Internet users to send and copy unauthorized copies of popular music, motion pictures and other filmed entertainment. Among the earlier popular providers of such infringing content were "pirate" Web sites and FTP ("File Transfer Protocol") sites. But these sites had obvious limitations. The Web sites were located on "always on" computers with fixed IP addresses, and operated by identifiable individuals or entities, and thus were relatively easy for copyright owners to find and shut down. And individual FTP sites were not easy for the uninitiated to find and, once found, were not convenient to search.

THE NAPSTER PEER-TO-PEER SYSTEM

16. In late 1998, reportedly responding to the problems he and his friends were having finding popular music files on the Web (such as dead hyperlinks to Web sites that had been shut down), a college student named Shawn Fanning began to develop a system for searching for MP3 files not on Web or FTP sites but on the hard drives of other users' computers, and for transferring those files in "peer-to-peer" fashion, from user computer to user computer, without relying on a central computer to host the files.

17. This system, called Napster, ultimately reached millions of users. Napster created a private network that enabled users to search the contents of other users' computers for audio files they were making available for distribution. Once a desired recording was located, the client program would then copy selected files directly from one user's computer to another, in a peer-to-peer transaction. Because of the near-limitless number of songs available at no cost, Napster earned a reputation of being essentially a networked "jukebox" – one that allowed users to keep and further distribute the songs they downloaded.

18. To gain access to the network, a user was first required to download the Napster client program, which Napster made available for free from its Web site. Upon first use of the program, the user was prompted to perform certain tasks, such as agreeing to Napster's "Terms of Service" and selecting a username and password.

19. To make MP3 files on the user's computer available to others via Napster, the Napster client application prompted the user to identify a "share directory" of files on his or her computer that could be seen and downloaded by other users. Upon logging on to the network, the Napster client scanned this "share directory" and verified that the available files were properly formatted in the correct MP3 format. Once the client verified the files, it transmitted the file names and other information about the files to Napster's central servers, where this information was aggregated in "composite directories" of names of files available for downloading from the computers of connected users.

20. While connected to the network, a Napster user could easily search for any song or other audio work by simply entering search terms in the spaces provided on the screen. By way of example, a user searching for Frank Sinatra's "In the Wee Small Hours of the Morning" might search for "Frank Sinatra," "Sinatra," "Wee Small Hours of the Morning," "Wee Small Hours," or "Sinatra Wee Small Hours." That search query would automatically be compared to the file names in the composite directories, and nearly instantly a list of dozens or more potentially matching files would be displayed on the client. By the user selecting the desired file name and clicking "find," Napster automatically sent the distributing user's IP address to the copying user's client application. The application then automatically used the address to create a "peer-to-peer" connection between the two users' computers and instantly begin a direct download

of the file from one to the other, with the file transfer itself bypassing Napster's central servers.

21. Depending on the connection speeds of each user and other factors, the download of an MP3 file from one user to another could be completed within a matter of minutes (or even more quickly). The completion of the download was dependent on both the distributing user and the copying user staying online and connected to the network from beginning to end. (Either one's logging off the network would terminate the download unsuccessfully.) Once the download was completed, each user now had an identical copy of the song, and the second copy was now also available for distribution to others.

22. Thus, although Napster's servers did not store MP3 files, and Napster's operators did not tell users what files to search for or download, the Napster system provided significant assistance to users' large-scale copying and distribution of unauthorized copies of musical works.

DEFENDANTS' SYSTEMS

23. Since the rise of Napster's popularity, numerous similar "peer-to-peer" systems for copying and distributing music, video, and other files have been deployed. Defendants' systems have been among the most popular.

24. Defendants MusicCity and Grokster each initially operated its own near-clone of the Napster system before moving to the FastTrack platform. In January 2001, defendant MusicCity began operating a so-called "OpenNap" system. [ID 543792][2] Previously, third parties had reverse-

[2] Citations in brackets are to documents produced in this litigation or deposition transcripts. Citations are meant to be illustrative of support for a particular point, not exhaustive. Documents beginning with the prefix "ID" or "MUS" were produced by MusicCity; the prefix "GR" indicates documents produced by Grokster.

engineered the technology comprising the Napster system and released both "client" software (for use by users on their personal computers) and "server" software (for use by system operators on their central computers) that functioned in almost exactly the same fashion as Napster, with some enhancements. MusicCity ran one of these clone services. It operated in the range of 30 central servers, to which up to 40,000 users connected at once, making up to 15 million files available for copying. Composite directories of these files were housed on MusicCity's servers. [ID 167428, 545010] MusicCity distributed a client application known as "FileShare" and utilized software known popularly as "OpenNap" – named in part for its copying of the Napster technology – for its central directory servers.

25. In late 2000, the principals behind defendant Grokster, operating as a company named Swaptor, deployed a Napster-like service using the same central-server technology as MusicCity's OpenNap system. Swaptor operated central directory servers and distributed a "Swaptor" client application. With the exception that Swaptor allowed users to share any sort of file (not just audio files), it functioned just as Napster did.

26. In April 2000, defendant Kazaa, a Dutch company, in conjunction with its Estonian-based contractor, Bluemoon Interactive, began development of a file-distribution platform intended to improve upon the design of Napster. Kazaa referred to that platform as "FastTrack" and licensed other companies, such as defendants MusicCity and Grokster, to launch and interconnect with their own "branded" versions of the client application. By mid-2001, MusicCity (with an application named "Morpheus"), Grokster, and Kazaa were all operating systems based on the FastTrack platform. The systems were fully interconnected (and effectively acted as a single network) in that users could search for and copy files

from other users regardless of whether a user had connected to the network with a MusicCity, Grokster or Kazaa client application.

27. The discussion of the FastTrack-based network that follows describes the basic functioning of all defendants' from mid-2001 through early 2002, when an apparent business dispute caused Kazaa to disable MusicCity's FastTrack system. MusicCity thereafter deployed a file-distribution system with similar functionality, still named Morpheus, that has operated on a technology platform known as Gnutella. The post-FastTrack versions of Morpheus also are discussed below.

User Experience of Defendants' FastTrack-Based Systems

28. A user's experience searching for, downloading, and distributing media files is quite similar whether using Napster or one of the defendants' FastTrack-based systems: using a client application, a user connects into the network; the user identifies files on his or her computer to offer for distribution; the file names and associated descriptive data are compiled in composite directories; the user searches for files meeting certain criteria, reviews a list of results, and downloads selected items. For example, a user seeking songs by Frank Sinatra need only click "Audio" (to conduct a search for audio files only), click "Artist," type "Frank Sinatra" and click a search button. Seconds later, a list of audio files will appear, typically containing numerous sound recordings of Sinatra songs. Clicking one item in the list initiates a peer-to-peer copying of the file from the distributing user's computer. One principal difference that a user searching for files will see is the availability of video, and other files, in addition to audio selections. A search to obtain a copy of a feature film proceeds similarly: click "Video," click "Title," type "Blackhawk Down," and click a

search button. Typically, results showing copies of the popular motion picture will be displayed.

29. Like Napster, each defendant's system has enabled users to designate which files on their own computer should be made available for copying by others. Like Napster as well, defendants' systems scan the user's directories to add information about available files to composite directories for convenient searching by other users. The default setting on defendants' applications is to make files downloaded via the application automatically available for further distribution to other users on the network, thus promoting a viral dissemination of works.

30. Defendants' FastTrack-based systems improved on Napster in many ways visible to users, some of which are discussed in more detail below. For example, defendants' systems have allowed users to search not only the names of files but also to search the "metadata" (described below) associated with files. Metadata describes available files in considerably greater detail and thus enables easier and more accurate searching. Over time, defendants also have added such enhanced features as filters to permit users to screen out pornographic or offensive files from their search results, filters to screen out "bogus" files, and filters to screen out files that may potentially contain viruses. None of these enhancements changes the fundamental similarity of the user experience.

Use of Central Services and Client Applications

31. Kazaa developed a proprietary software library, called "KazaaLib," as the foundation of the FastTrack system. KazaaLib, also known as "the FastTrack Stack," is the core component of Kazaa's own "branded" client software, the Kazaa Media Desktop ("KMD"), and of the Grokster client software, and was the core component of the Morpheus client software until February 2002.

32. Like Napster, defendants' FastTrack-based systems have consisted of "client" software run on user computers (versions of which bear the names Morpheus, Grokster, or Kazaa), and "server" software run on defendants' central servers.

33. As was the case with Napster, a user seeking to access any defendant's system must first download defendant's proprietary software, which defendants have made available at no cost via Web sites. Defendants' systems have required a user, after downloading the application, first to register an account with defendant by interacting with a defendant's central servers and specifying a username and providing an e-mail address.

34. Until an early 2002 design change, defendants required users to specify a unique username, to identify the user on the system, and a password to control access to the user's account. The first time a user connected to the network after downloading the defendants' software, the user's client application would not support file searching until the user registered his or her account with the central servers. The program then communicated the registration information to each defendant's central server program called "kazaaserver." [ID 544749, 544558; M. Rung Dep. 52-53, D. Rung Dep. 136-37, Smith Dep. 103, 106, 108, 119-20] At the beginning of each subsequent use, the user's program would communicate with a central kazaaserver to log the user in to the network under his or her unique name.

35. Once registered and logged in, the client application would need to connect to the network by obtaining the IP address of, and connecting to, a so-called "supernode." Supernodes are other users, running the standard client application, that are deemed by the network to have significant available computing resources and other characteristics (*e.g.*, high bandwidth, lots of memory, not

behind a firewall). The network thus "elevates" certain users to supernode status and has those supernodes perform higher level network functions. The FastTrack network functions by having users (known as "nodes") join the network by connecting to supernodes. One supernode typically supports hundreds of nodes connected to it. At any given moment, depending on network needs, there may be thousands of active supernodes. Users (or nodes) may be automatically elevated from node to supernode (and vice versa) as system needs demand. In this way, the FastTrack network commissions as many supernodes as are needed for efficient network operation. (While the default setting is that nodes are available to be supernodes, users can change a setting in the client application to prevent their application from acting as a supernode.)

36. FastTrack has allocated some functions between the client and server software differently than Napster did: In the FastTrack system, file directory services are supplied by the client software instead of by the server software. In other words, rather than having the composite directories maintained on central servers, supernodes maintain "composite directories" of files available on the computers, or nodes, connected to them. Essentially, supernodes perform the same type of directory function as Napster's servers. Supernodes maintain communications with other supernodes so that user searches are compared against the composite directories of multiple supernodes, providing more opportunities for users to find the files for which they are looking.

37. Despite being referred to as fully "decentralized," defendants' FastTrack-based systems have, at various times, relied upon multiple central servers to function as intended:

a) *First*, as noted above, until early 2002, users of defendants' systems initially registered accounts on

a central "kazaaserver" program, and communicated with this central server on each use thereafter in order to have their unique usernames verified. In connection with this, defendants' servers retained a database of usernames and passwords, and also made a record of the IP address from which each user last connected. [Smith Dep. 106-07] In a process known as "auto-updating," defendants also used the central kazaaserver to communicate with the client application when a new version of the software was available. In this way, the auto-update mechanism enabled defendants to rapidly transition users to the most updated client application. The central kazaaservers were one important means through which defendants managed and controlled the network. These issues are discussed in detail below.

b) *Second*, for some time after the launch of the FastTrack network, defendants operated their own special supernodes, known as "root" or "seed server" supernodes. Using special server-side software (known simply as "Kazaa"), defendants ran full-time "root" supernodes from their own central servers. [ID 168154, 168335; GR00159; D. Rung Dep. 87, Smith Dep. 122, 128] As stated, to use the network, a user needed to obtain the IP address of at least one active supernode. [ID 544409] Supplying users with a list of active supernode IP addresses was one important function performed by defendants' central server root supernodes. The IP addresses of defendants' central root supernodes were included in the client application so that, upon launching the application, the user would automatically connect to a defendant's root supernode to receive a listing of the IP addresses of then-active user supernodes – which the user would use to connect to the network. (Over time,

defendants attempted to reduce their reliance on root supernodes by providing a list of user supernodes inside the client application. [Smith Dep. 366-67]) In addition, defendants' testimony indicates that for some period of time, the root supernodes on defendants' servers performed tasks comparable to regular user supernodes in terms of compiling "composite directories" of files made available by the users connected to defendants' root supernodes. [Smith Dep. 382; D. Rung Dep. 126-29] (In this regard, defendants' central servers would have performed essentially the same function as Napster's, just on a smaller scale.) Eventually, all defendants stopped hosting composite directories on their own supernodes. [D. Rung Dep. 128-29; Smith Dep. 382]

c) *Third*, defendants have used any number of central servers to deliver "web" content inside the client application while a user is connected to the network. [D. Rung Dep. 204] For example, in the case of defendant MusicCity, the "start page" window inside the client application receives essentially the same information a user would see if that user had typed in the address of MusicCity's web site. In this regard, a user connected to the network using the client application had a continual connection with central servers owned and controlled by defendant MusicCity. MusicCity had the ability to control whatever information was displayed to users while those users were connected to the system. [Smith Dep. 117-19] Each defendant has controlled this window and used it to communicate directly with its users, including providing announcements updating users about problems with the system and efforts to solve them. [Smith Dep. 62-63, 117] For example, in February 2002, MusicCity used this space to inform

users that a rumored security flaw in Morpheus was untrue and that it should not cause them to worry about using the application. MusicCity also offered users running the client application access to "help" pages served from its central servers.

d) *Fourth*, other central servers, hosted by defendants or third party advertisers, continually have transmitted advertisements to other windows inside the client application -- while users are connected to the network. [D. Rung Dep. 216; M. Rung Dep. 53; Smith Dep. 297-98] This functioned by having the client application communicate with one of defendants' central servers to receive the Internet address of the server hosting the actual advertising content. The client application would then communicate with other central servers to receive the advertising content directly. At least in the case of MusicCity, ads were served directly into the client application from central servers belonging to MusicCity's advertising clients or their agents. [Smith Dep. 292-93] In this regard, for defendants' business purposes, there was regular communication between the client application and central servers.

e) *Fifth*, defendants at various times have provided, also from central servers, central chat room and bulletin board services that users used from inside the client application to seek and obtain assistance on how to use the system. [D. Rung Dep. 64, 151; Smith Dep. 76, 142-47]

38. In sum, rather than being exclusively decentralized, defendants' FastTrack-based systems were designed (and have operated) to rely on numerous central servers to perform network and business functions.

Post-FastTrack Morpheus System

39. In late February 2002, because of what was reported in the press as a business dispute between licensor Kazaa and licensee MusicCity, Kazaa permanently prevented MusicCity's users from connecting to the system. According, to MusicCity Chief Technology Officer Darrell Smith, through a combination of a software upgrade that was made available only to Grokster and Kazaa, apparent central actions by Kazaa to replace Morpheus supernodes with Grokster and Kazaa supernodes, and a central broadcast message to the Grokster and Kazaa supernodes to keep Morpheus nodes from connecting to the network, Kazaa permanently disconnected Morpheus and its users from the network. [ID 1532134; Smith Dep. 399-414; D. Rung Dep. 108-09]

40. Within days, on March 1, 2002, MusicCity launched a new version of its file-distribution system, still called Morpheus, but based on the "Gnutella" technology, rather than FastTrack.

41. Gnutella is a peer-to-peer technology that achieves the same ends as the Napster and FastTrack systems. Like these systems, Gnutella facilitates searching directories of files available on users' computers and enables user-to-user file transfers. As with FastTrack, file directories in the Gnutella system do not reside on central servers but instead on user computers across the system. In the original Gnutella scheme, each search issued by a user might be processed by thousands of nodes as each node compared the search against its own file directory. More recent versions have introduced "ultrapeers," rough analogs of FastTrack's supernodes, in order to more efficiently allocate the burden of processing searches. Gnutella technology has evolved in a semi-coordinated effort of various unaffiliated parties, stemming from multiple open publications specifying the workings of a single program known as "Gnutella." Developers do not

license the right to create code pursuant to the open specification – they instead treat it as being in the public domain. However, in some cases, they may keep proprietary the code they subsequently create based on the specification. (By contrast, Kazaa's FastTrack technology is proprietary at both the levels of specification and implementation. Its use of encryption has foiled outside efforts to fully specify its workings.) Because they adhere to the same open specification, most Gnutella-based clients are interoperable and, when run, usually seek to maintain a connection to a single public network.

42. Between March and August 2002, MusicCity has released several updated versions of its post-FastTrack software, including Morpheus Preview Edition (released in March), Morpheus 1.9 (released in June), and Morpheus 2.0 (released in August). Earlier versions of the Gnutella-based Morpheus, up through and including version 1.9, were derived from a Gnutella program known as "Gnucleus." Version 2.0 is derived from a different Gnutella program known as "Jtella." [Smith Dep. 481-82] Although MusicCity currently promotes Version 2.0, it is currently supporting both the 1.9 and 2.0 versions of Morpheus. [Smith Dep. 486-87]

43. Some or all of these versions have shared features of Morpheus' former FastTrack-based applications that are important to users' ability to search for, download, and distribute files. These include the following:

a) Giving client applications ongoing access to a continual source of IP addresses of other computers connected to the network running Gnutella-based client applications -- addresses that are required to connect to the network. In the current version (Morpheus 2.0), at each use, Morpheus contacts a central server named "morpheus.gnutellanet.com" to

obtain a list of addresses of other clients. Morpheus is programmed to contact other sources of IP addresses as well. Morpheus also retains a list of addresses of other clients obtained in the last successful use session. [Smith Dep. 499-511]

b) Operating "ultrapeers" that perform tasks analogous to the composite directories of supernodes (Morpheus 1.9).

c) Collecting file metadata from MP3 files to improve users' searches, including enabling "category" searches so as to help users find, for example, "Top 40" songs (Morpheus 2.0). [Smith Dep. 474-75, 528]

d) Displaying content from MusicCity's Web servers in the main window of the application and displaying advertisements transmitted from central servers (all versions). [Smith Dep. 489, 490]

e) Providing filters, such as those that help users avoid downloading files that may contain viruses. [Smith Dep. 526-27]

f) And, providing "auto updates" (*i.e.*, automatic messages displayed by the application, triggered by a communication from a central MusicCity server, to encourage a user to immediately download new software) so that enhancements to the software are quickly and widely distributed to users (Morpheus 2.0). MusicCity's Darrell Smith testified MusicCity updated its 2.0 software *sixteen* times in the first five days of operation. [Smith Dep. 514-15, 523-24]

44. In addition, the two-way communications between the client applications and MusicCity's central servers are in certain respects even more persistent and continuous than in the FastTrack-based systems. According to Smith, all client

applications communicate with MusicCity's central servers once every hour, so that MusicCity may give directions to the applications regarding which of two different methods for routing searches through the network to use. [Smith Dep. 517-23]

Defendants' Ongoing Participation with and Ability To Exercise Control Over Their Systems

45. Defendants have played an active and ongoing role in the operation, support and maintenance of their systems. In addition, in many ways, defendants have retained and exercised the ability to supervise or control their systems. That the directories of available files are stored on user computers (supernodes) rather than central servers has not in practice prevented defendants from exercising such control, nor in theory should it.

46. As discussed more fully below, defendants' ongoing participation in the operation and maintenance of their systems has included: operating full-time and centralized "root supernode" servers, which, among other things, provided users with the IP addresses of "live" user supernodes; making modifications to variable parameters in defendants' central kazaaservers, which affected changes in the functioning of the client application and ultimately the network; spending numerous hours monitoring for, identifying and resolving network problems that were affecting user performance; and testing and deploying revised versions of the client application to address network performance problems and to protect the network from intrusions from unwanted third-parties. Many of these episodes of participation by defendants also evidence defendants' ability to exercise meaningful control over the network. In addition, defendants' control of network activities has included taking steps to restrict who may access the network or communicate with other users of the network,

and to restrict what files may be searched for or found on the network. Defendants' supervision also has included providing technical help to users who report problems playing or downloading files. [ID 137081]

DEFENDANTS' ONGOING INVOLVEMENT IN THE OPERATION OF THEIR SYSTEMS

47. Defendants, operators of private, commercial networks, have had a persistent and ongoing involvement with the operation and maintenance of their systems, and relationship with their users. Their conduct has been very different from that of a manufacturer who sells a product for a sum of money and then has only limited, if any, contact with the purchase thereafter. Examples of defendants' continuous relationship with their users are not limited to defendants' FastTrack systems, but also are demonstrated in the operation of defendant MusicCity's Gnutella-based systems. Examples of defendants' persistent involvement in the operation, support and maintenance of the network, which were revealed through discovery or are observable through use of the network, include the following:

48. As described above, during various periods in the development and growth of the FastTrack network, defendants each operated what they referred to as "root" supernodes. [Smith Dep. 122, 125, 128, 374, 383-84] One key function performed by these central-server root supernodes was keeping track of, and providing to users seeking to connect to the network, the IP addresses of other supernodes (user supernodes) that were "live" at that moment. [Smith Dep. 122] Nodes attempting to join the network needed to know the addresses of supernodes to which they could connect. Without this information, users would simply be unable to connect to the network. During the formative months of the network, if there were no root

supernodes being operated by defendants, the network would not have been able to grow. [Smith Dep. 177-178, 189]

49. Defendants also participated in the operation of, and controlled, the network through their operation of the "kazaaservers" described above. In addition to performing registration and login functions, the kazaaserver run by defendants enabled defendants to adjust the functioning of the network from a central location. What this means is that defendants were able to edit "variables" within the central kazaaservers and, as a result, the kazaaservers would affect changes in the parameters of each client application communicating with it. In some cases this would change the way the client application functioned internally; in other cases, this would change the overall functioning of the network as a whole. By setting client parameters through kazaaservers, defendants have been able to tune the performance of the FastTrack network by adjusting settings on their central servers. At times, assuming central command of the network was critical, to fix system performance problems. Some illustrations follow:

a) According to E-mails produced in this case, in May 2001, Bluemoon reported to MusicCity that it had been "monitoring the network," and that it was "time to disable exhaustive search (disable broadcasts) at kazaaservers." [ID 168257] According to MusicCity's Darrell Smith, this refers to decreasing the number of supernodes that a user's search would reach, in order to lower the bandwidth drain on supernodes and to allow the network to scale better (sustain larger number of simultaneous users). This would be a natural parameter to decrease as the network grew. Bluemoon told MusicCity to change parameter "EnableBroadcasts" on kazaaserver from a value of "1" to "0." This had

the effect of changing the behavior of user supernodes such that search queries would be sent to fewer than all supernodes. [Smith Dep. 192-93, 196-99; ID 168257, 176100] According to Smith, in the next version of KazaaLib, defendant Kazaa "add[ed] server variables...so we can tune bandwidth/performance" by adjusting the extent of search broadcasts depending on other network factors. [Smith Dep. 195; ID 168257, 176100]

b) In another instance, defendant MusicCity was able to control (and change) the frequency with which advertisements rotated inside the client application, and thus conserve bandwidth at the MusicCity servers, by making a change to a different variable ("Variable=BannersRotate Minutes:") in the central kazaaserver. [Smith Dep. 291, 297-98; ID 545568, 436033]

c) In still another instance, defendants affected a system-wide change in the communications protocol (the language used by computers to communicate with each other) and encryption (the manner in which these communications were made unreadable by others) through a change in the central kazaaservers. The result of defendants' efforts was that any users using a version of the client application with the old communications protocol and encryption were prevented from communicating and forming a network with users running the updated client application, protocol and encryption. [Smith Dep. 317-18; ID 176153, 164278] Defendants did this to protect the network from a group which had made progress reverse engineering the client application. [Smith Dep. 335; ID 164299] To accomplish this, defendants

used the kazaaservers in two related ways. First, by making changes to variables in the kazaaserver, defendants were able to monitor what proportion of users had upgraded to the new client application version. [Smith Dep. 349-51; ID 176153] Once enough users had upgraded to the new client application, defendants needed to activate the new protocol and encryption, and they again did this by modifying variables in the central kazaaservers. [Smith Dep. 352-54; ID 164278] These changes to variables in the central kazaaserver caused a change in certain parameters of each individual client application [ID 437346] – and, in this instance, resulted in a very significant change in the functioning of the overall network.

50. As mentioned, defendants also used the central kazaaservers to initiate auto-updates of the client application to newer versions. When defendants activated the auto-update feature (by making a change within the kazaaservers), the kazaaservers would alert client applications that a new version of the application was available. Thus, users logging onto the network would receive a notice that an upgrade was available and an invitation to download the upgrade. [D. Rung. Dep. 236-39, 242; Smith Dep. 107, 151-52; ID 168207] At least defendant MusicCity distributed the auto-updates of the client application from their own servers. [Smith Dep. 116]

51. In addition, beginning with version 1.3, defendants used the central kazaaservers to ensure that user supernodes were always running the most recent version of the client application. This was important, according to MusicCity CTO Smith, because user supernodes running an old version of the application would splinter from the main network and form a separate network, independent of supernodes running

the latest version of the application. [Smith Dep. 254] For this reason, each active supernode communicated with the central kazaaservers *every 12 hours* to check for auto-updates. In the event the kazaaserver indicated that the user supernode was not running the latest version of the client application, that supernode immediately ceased to act as a supernode and reverted to regular node status. [Smith Dep. 253-53, 260-61; ID 168312]

52. Because it was important that supernodes were quickly transitioned to any new version of the client application, once an auto-update was made, defendants needed to keep the auto-update indicator active in the kazaaservers continually. [Smith Dep. 258-59] At one point, according to Smith, this created problems for MusicCity because too many users were trying to download the new client version and were creating performance problems with the MusicCity central servers. [Smith Dep. 257] To address the competing demands of having the auto-update indicator active in the kazaaserver while trying to slow the pace of application downloads, MusicCity engaged in a process of turning the kazaaserver auto-update on every evening and off every morning (to communicate with supernodes but to avoid peak user download periods). Illustrating defendants' ongoing participation in the operation of the network, MusicCity did this every evening and morning for a week or more and then finally activated the kazaaserver auto-update full-time. [Smith Dep. 258-60]

53. With later versions of KMD and Grokster, defendants no longer needed the kazaaserver servers in order to centrally affect the functioning of the client applications. Defendants appear to have a means to communicate a control message to supernodes, which, in turn, propagate that message to other supernodes and nodes. Thus, defendants appear still to be able to centrally modify parameters in the client applications,

and ultimately change the functionality of the client applications. [Smith Dep. 411-15]

54. Defendants also monitored the performance of the network centrally, and actively worked to address performance problems to improve the user experience. Indeed, according to MusicCity's Smith, it was common for defendant Kazaa and Bluemoon to monitor the network for performance, and to work to resolve any performance problems. [Smith Dep. 88-89, 227] Smith also confirms that he and his staff spent substantial amounts of time working with the client application to ensure that the user experience was as positive as possible. [Smith Dep. 235-36, 238-39] By way of illustration:

a) Defendants had the means to learn the IP addresses of all current supernodes and centrally decide to increase or decrease the number of supernodes to take account of particular network bandwidth constraints at any given moment. [Smith Dep. 113-116]

b) At one point, the network developed a significant problem because users were adding too much metadata information in fields only intended for a few words. The impact of this was that the client application was operating sluggishly and returning too few results. In order to fix the problem and improve network performance, defendants deployed an upgraded version of the client application. [Smith Dep. 223-25; ID 168283]

c) E-mails and testimony from MusicCity's CTO Smith reveal an episode in which, in response to user complaints about long login times, Smith spent ten hours working with the engineers at Bluemoon to fix various performance problems

affecting MusicCity users. [Smith Dep. 325-27, 329; ID 176150, 546006]

55. Defendants also evidence their ongoing participation in the maintenance of the network by developing, distributing and extensively testing improved and upgraded versions of the client application and server-side software. Defendants modified and/or upgraded the FastTrack client and server applications multiple times. Again, for example:

a) Defendant MusicCity did extensive testing of the client application upgrade to version 1.3. According to MusicCity's Smith, MusicCity installed no less than 50 instances of the upgraded client application on computers in 5 different states. Upon finding two bugs, Smith and his team spent substantial amounts of time making sure that the client application would properly connect into the MusicCity servers and that the web content was properly being displayed in the client application from MusicCity servers. [Smith Dep. 234, 237-38]

b) Defendants also implemented a new and updated version of the server-side root supernode software to address a MusicCity concern that the root supernodes stop creating a directory of user files. [Smith Dep. 379-80; ID 436159]

56. At a more basic level, defendants have supervised users of their systems by supporting e-mail help lines and giving technical advice to users on how to operate the application. On numerous occasions, users explicitly reported that they had downloaded or were attempting to download copyrighted files, yet defendants' personnel nevertheless gave technical support to help accomplish infringements. [GR04524; ID 137081]

57. MusicCity's Gnutella-based systems exhibit many of

the same indicia of participation and central control, including hourly communications between user nodes and central servers during which MusicCity can centrally change and fine-tune the search priorities carried out by the client applications, auto updates of the software initiated by a communication with a central MusicCity server, communication with their users via web content served into and displayed by the client application from MusicCity central servers, user technical support, and a continual and extensive development effort to improve the features and performance of the application and network. [Smith Dep. 484-86,517-23]

Defendants' Exercise of Control Over Their Network

58. Of course, many of the elements of defendants' ongoing participation discussed above also reflect defendant's ability to control, and exercise of control over, their network. In addition, defendants exercised control over the network by deciding which enhancements to add to new versions of the software being made available to users. As demonstrated above, with new versions of their software, defendants had the ability to deny access to users running older versions. Thus, the ability to officially issue such an update was key to controlling access to the network. This control was maintained by each defendant over its own system. They alone held "digital keys" with which to "digitally sign" new versions of their client programs. This gave defendants the sole authority to offer client updates to users to enhance or otherwise alter the client software running on user computers. [Smith Dep. 156-57; ID 168216]

59. Defendants also exercised their ability to control the network in a number of other ways, including by blocking access of individual users, by blocking access of IP addresses, by preventing copyright monitoring organizations from having access, by requiring users to upgrade to new

client applications in order to continue using the network, and ultimately by terminating all the users of one defendant-licensee. These are discussed in turn below.

60. As noted above, defendants operated a log-in server that client applications communicated with before connecting to the network each time. The server checked the unique username and password, to ensure that a user's identity on the network was unique and accurately presented. If a user-provided password did not match the password on file in the central server, then the user would not be able to log on to the system. Grokster's Matthew Rung testified that he sporadically used this feature to block certain users who had been the subject of complaints by copyright owners, explaining: "What we would do is lock them out by changing their password. . . . " [M. Rung Dep. 154-60] Similarly, MusicCity's Smith testified that MusicCity had blocked specific user names (albeit likely in a way that was ineffective) and that they could have blocked access for all of its users by scrambling or changing their password in the database. [Smith Dep. 17-21, 154] Although defendants abandoned the central log-in functionality during the pendency of the lawsuit, it is a feature that was – and could again – be available to them.

61. Defendants also had the ability to block access to larger numbers of users at a time, based on the IP addresses from which the users were accessing the system. This feature was referred to as the "user banned list" and it apparently prevented certain computers from accessing the network by maintaining a "banlist" of hundreds of IP addresses that was used in connection with the central "kazaaserver" program. [ID 545672, 545901, 176150] The apparent purpose of the banlist was to block network access to computers that were used to disrupt the network, such as by hackers launching "denial of service" attacks. [Smith

Dep. 110, 302-03] At least defendant Kazaa used the user banned feature to block IP addresses. [Smith Dep. 311]

62. In addition, defendants MusicCity and Kazaa discussed how to deny network access to a company called MediaEnforcer that provided a software program which permitted copyright owners to search for infringements on peer-to-peer networks. According to e-mails produced by MusicCity, over the course of several weeks in May and June 2001, Kazaa's developers, Bluemoon, attempted to and appear to have devised a way to block the MediaEnforcer program from accessing the system. [ID 172350, 174635, 545341, 545361] In early July 2001, then-MusicCity CEO Michael Weiss reported to a member of his board of directors that defendants "have already disabled the ability for 3rd parties, such as Media Enforcer, to look into either network." [MUS013602-04] This is consistent with defendants actions in operating its earlier "OpenNap" Napster clone service, when MusicCity blocked the IP addresses of at least two groups affiliated with copyright owners to keep them off the network – Mitchell, Silberburg & Knupp, counsel for the record company plaintiffs in *Napster* and in this case, and NetPD, a company used by copyright owners to combat online piracy. [ID 167545, 544361]

63. Defendants' control over access to the network was so complete that, as explained above, on one occasion in September 2001, by changing aspects of the network's protocol and encryption, defendants forced users of the system to upgrade to the newest software or be unable to connect to any computer using the new software. Defendants made this change because a group of hackers, in an effort known as the "giFT project," had devised a way to search for and download files without using defendants' propriety applications. In this way, defendants exercised their control over the network to effectively shut out potential intruders

and users who did not upgrade. [D. Rung Dep. 105-07; Smith Dep. 316, 335, 351; ID 164278, 176153, 76156, 437346]

64. Defendants continued to make adjustments to their system to ensure that the FastTrack network – and the users' files available on the network – would be available only to users of defendants' client applications. Prior versions of FastTrack clients would, when called upon properly, display pages of information to standard Web browsers. These pages included a listing of files currently available for copying by the client, information about the FastTrack network as a whole, and supernode-related information if the client were in supernode mode. [ID 168351] Among other things, this meant that there was no need to use defendants' proprietary application to browse and download the files on an individual user's computer – a Web browser would work for this purpose. Ultimately Kazaa addressed this by adding a layer of security to prevent access to this information by unlicensed applications.

65. And, in a most obvious exercise of control over access to the system, in late February 2002, Kazaa provided updated software to licensee Grokster but not to MusicCity, and shortly thereafter sent communications through the system that made it impossible for the MusicCity client applications to connect to the network or to one another. [Smith Dep. 411-15]

66. That MusicCity's Morpheus program now operates on Gnutella does not mean that MusicCity no longer is able to control access to its system. By way of example, MusicCity's Darrell Smith testified that because of their unhappiness with Morpheus 2.0, other providers of Gnutella-based applications have been considering updating all of their software applications to prevent connections to Morpheus users. [Smith Dep. 494-95] I am not aware of any

technological impediment making it infeasible for MusicCity itself to decide to block access to users of other applications, or to ban users by IP address, as it has done in the past.

IDENTIFYING AND CONTROLLING ACCESS TO FILES ON THE NETWORK

67. In many ways, defendants have (or could have) exercised control or supervision over the types of files that may be searched for or found on defendants' systems. That defendants have not used this ability to block the unauthorized distribution of copyrighted works does not mean that it is not feasible to do so.

68. **[REDACTED]**

69. Defendants have in fact implemented basic filtering mechanisms to limit (or allow users to limit) the files that are displayed in response to search queries. Examples of this include the following:

a) Although ultimately removed as a filtering criteria at the request of defendant MusicCity, at the very beginning of FastTrack, Kazaa made a decision to limit the quality of audio files to a maximum "bit rate" of 128 kbps, a level of fidelity below that offered by CDs. Kazaa accomplished this by filtering out files possessing a higher quality. [Smith Dep. 150; ID 168201]

b) In 2001, defendants updated their client applications to include a "virus filter" that gave a user the choice to not display search results if there were indicators the referenced files might carry computer viruses. A file was conservatively and crudely identified as a potential virus carrier if it were any one of several types of files capable of running as a program on the user's computer. The

list of suspect types appeared to be embedded in the client program.

c) Also in 2001, Kazaa introduced filters for "offensive adult content" and "adult content." Paralleling the virus filter implementation, these filters appeared to work on the principle of not displaying search results if the referenced files carried file names or other textual metadata that included certain pornographic terms. Again, the offensive and generic lists of adult content appear to be embedded in the client program. In addition, users may type in terms of their own choosing, of any sort, to customize the list.

d) FastTrack clients also now include a "bogus file filter." When this filter is activated, it appears that audio and video files below a certain size do not occur in search results. Such small files would represent extraordinarily brief recordings at a typical level of recording quality. The filter may have other effects as well.

70. As the following discussion demonstrates, defendants also are able to, and do, identify files that are being made available on their system, and can use this information to help distinguish authorized from unauthorized copies.

71. Defendants already extract information about each file being offered for distribution by each user. By way of background, many types of media files – whether audio or video – carry with them what is known as "metadata." Metadata is essentially information that is not part of the file contents, but which provides descriptive information about the contents of the file. [ID 545105] The file name is one form of metadata. A typical file name for an MP3 audio file, for example, might be: Sinatra – Wee Small Hours.mp3. As

in this example, many times the file name provides a complete and accurate description of the contents of a file.

72. Metadata consists of much more information than simply the file name. For an MP3 file, the metadata will include the artist and the song title. In most cases it will also include all or some of the following descriptors: the album from which the song comes, the genre of music, the length of the song, the bit rate at which the song was encoded (a general indicator of encoding quality), and the year the song was released. With regard to MP3 files, metadata are contained in "ID3 tags." The ID3 tags and thus the metadata provide significant information about the content of a file, above and beyond the file name. Similar metadata information is commonly specified in files containing recordings of commercially released motion pictures.

73. "Hashes" are another form of metadata that are a useful means of identifying files. Conceptually, a hash can be thought of as a unique identifier of a file, a sort of fingerprint. It is a computed value based on the bits in a file. In computer science, many different hash functions are used for many different purposes, with "MD5" and "SHA-1" being examples of common ones in peer-to-peer file-distribution systems. Typically, a digital file containing a copy of a recording or a motion picture, for instance, will have a hash, or digital signature, that is unique to that file, and to copies of that file.

74. Defendants' systems have collected and computed metadata, including hash values, for each file offered for distribution by each user. As explained above, when a user launches the client application, an index of the files that user is offering is transmitted to the supernode. However, before that index is transmitted, the files that user proposes for "sharing" are scanned, and the metadata are collected and computed and stored in a database file on the user's

computer. These metadata are then transmitted to that user's supernode where they become part of the supernode's composite directory. The user's "share directory" is scanned regularly for changes (approximately every 60 seconds) and, if any new files are found, those files are scanned and the metadata for those files are collected, computed, and transmitted to the supernode. [ID 545105] When a file is downloaded by a user, the metadata are downloaded as well. [ID 545105]

75. The license agreements between Kazaa and its licensees MusicCity and Grokster explain it as follows:

"Automatic Meta Data Assignment (AMDA)

> When files are imported to KaZaA, a variety of Meta Data – information about the content of the file – is automatically extracted. The Meta Data being detected depends on the file type – for MP3 files, it comprises Title, Album, Artist, Length, and bit rate; for Video files it comprises Resolution, Color Depth and Codec; and for Word documents it comprises Author, Title and Version. As all of this Meta data is searchable, it greatly increases the search possibilities and accuracy. And KaZaA uses all the Meta Data to automatically arrange imported files in a personalized media library." [MUS013107; GR00159]

76. In comparison to systems that match search queries only against file names (such as Napster), extracting and using the metadata allows for much more accurate searches. Defendants themselves acknowledge this. They rely on the metadata to make their networks function, and they tout the search accuracy enabled by the use of metadata. [*e.g.*, ID 150543 ("Meta data, such as ID3 tags for mp3 files, is automatically extracted from files you share and made (sic)

searchable, which makes for much more accurate searches. You can search for album, title, artist, category, resolution, author, length and much more."); M. Rung Dep. 38-40] The already-extracted metadata information is one simple means defendants could use to identify the content of the files transmitted on their systems.

77. **[REDACTED]**

78. Defendants have used hash values to offer advanced file download features. If a file is large, or downloading too slowly, defendants' system allows that file to be downloaded from several users simultaneously. Likewise, if a download is interrupted for any reason, defendants' system will automatically search for the same file and resume downloading at the point of interruption. In order to offer these features, defendants need the ability to find a precisely identical (bit for bit) copy of the same file. Not just a file for which the file name is the same; and, not simply a file for which the metadata matches. In other words, the second file does not just have to be the same content (the same song or movie, for example); it needs to be an identical copy. For this, defendants appear to search for files with the same hash value.

79. In a sense, defendants already use these hash values to "filter" content – they recognize files as identical copies and copy from all of them to speed downloads. If such copies were identified, by the title, metadata, or other means, as unauthorized copies of works, defendants could also use the hash to make sure that all such copies were kept off the system.

80. In addition, MusicCity's Darrell Smith testified that a Kazaa principal informed him that a system for tracking copyrighted files that users were downloading could be implemented "quickly." [Smith Dep. 90-91] Tracking what

users were searching for and downloading would have been a means for defendants to combat infringement.

81. MusicCity's Gnutella-based Morpheus systems have retained much of the ability to control access to files (such as by filtering out some files that may contain viruses and other types of files), and to identify files (by extracting metadata or other identifying characteristics). [Smith Dep. 474-75,526-28]

PROTECTING COPYRIGHTED WORKS ON DEFENDANTS' SYSTEMS

82. There is nothing inherent in the technology of defendants' peer-to-peer systems that would prevent defendants from taking steps to prevent or greatly diminish the volume of copyright infringement on their systems. There are any number of processes defendants could have implemented that would have, to varying degrees, prevented copyright infringement. I believe that, if implemented correctly, such measures should still allow defendants' users to exchange material that is not copyrighted, is public domain material, or is material that the copyright owner has authorized for distribution.

83. I understand that defendants or their representatives have made the assertion that because the file directories used on their systems do not reside on central servers – but instead are maintained on a distributed basis by supernodes or otherwise by the users' computers – it is not possible for defendants to identify files their users are copying and distributing or to combat the infringement of copyrighted works via their systems. I disagree with this assertion.

84. Peer-to-peer file-distribution systems like those provided by defendants could take several approaches to providing protection for intellectual property. Roughly, these approaches can be divided into methods to prevent

intellectual property from being illegally copied or distributed at all, and methods meant to deter users from illegally copying or distributing such material. The ease of creating such mechanisms, the cost of deploying and running them, and any side effects on the operation of the system vary, and system designers need to match mechanisms to their systems. I do not seek to suggest the proper methods for these systems to handle this issue, but to show that they have several options as discussed in the following paragraphs.

85. Peer-to-peer file-distribution systems typically (1) create directories of files available on distributing users' computers, (2) offer services to help users search such directories for files to download, and (3) offer support for copying files from one machine to another. Thwarting copyright infringement can be addressed during any or all of these stages.

86. First, peer-to-peer systems typically create "file sharing" directories at some or all nodes (*e.g.*, individual computers) on the systems. Files not represented in these directories are not available for distribution and copying, so the operators of a peer-to-peer system could provide intellectual property protection by preventing copyrighted material from ever appearing in these directories. Typically, these directories are created by scanning the individual "share" directories of peer nodes. Only those files that the scanning process chooses to enter into the file directory as available are visible to a search and thus available for downloading. Some peer-to-peer systems, including at least one iteration of MusicCity's Morpheus application, already have given users the ability on a file-by-file basis to make certain files invisible to the sharing directories. There is no reason that the choice of what to filter could not be made by the system operator rather than the user. And files containing

protected intellectual property could be excluded in this way. The KazaaLib makes clear that this is a capability of the system.

87. Second, even if such protected files are included in a peer-to-peer system's file directories, the searching mechanism need not allow them to match queries. Users need not be told that files containing protected intellectual property are available for download.

88. Third, protection could be applied at the point of file copying. The system could be programmed, at the client level or otherwise, not to allow copying of certain entries that appear in search result lists if that file is not authorized for distribution or copying.

89. All of these approaches require filtering of some type. Filtering removes certain items from (or prevents them from being added to) a list based on various criteria. The defendants in this case already have chosen to provide some level of filtering – they permit a user to choose to filter out adult content, offensive content, files that are likely to be "bogus," and files that may contain viruses.

90. For the purposes of protecting intellectual property, filtering would have to identify which files should or should not be made available on the system, which could be done in a number of ways. First, the file name is often descriptive of the contents. For example, files containing songs are often named after the song's title and performer. While certainly not a perfect identifier, filtering based on file names alone would likely result in a meaningful reduction in the current levels of infringement. Second, as noted above, the most popular audio and video formats contain metadata tags that describe the media content, and defendants' systems already recognize and collect such metadata. These tags typically contain the work's title, its author, and various other information useful for identifying the work. For the same

reasons defendants have touted the ability of metadata to increase the accuracy of searches, filtering based on metadata would have a higher level of accuracy. Third, digital representations of audio and video can be examined to determine their digital "fingerprint" using technologies that closely examine waveforms and other details of the digital encoding. These signatures -- which are based on the content of the file and do not depend on file names or other metadata -- can be compared to the signatures of protected works, and are designed to persist despite various manipulations or alterations of the data. (Third-party file identification technologies of this type are commercially available, and I understand companies providing such technology are submitting declarations to that effect). Each of these methods permits a peer-to-peer system to verify with some degree of confidence that an identified file is what it appears to be. These methods can be used in combination for even greater effectiveness.

91. Regardless of the method or methods used, filtering can be performed in two ways. In a "black list" approach, the filtering mechanism only allows into the system files that do *not* match certain pre-defined criteria. In other words, files are compared to a database of works the copying of which is *not* authorized. Any file that does not match the "black list" database criteria is added to the file directories and made available on the system. In a "white list" approach, the filtering mechanism only allows into the system those files that do match certain pre-defined criteria (for instance, that the file has specifically been authorized for free distribution). Anything not matching the criteria is presumed to be protected intellectual property, and is not allowed to be put on the list of files to share. These approaches have different properties, and peer-to-peer system operators could choose one or the other, or something else, based on specific system criteria.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants. [Filed Oct. 15, 2002]	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))

PLAINTIFFS' RESPONSE TO MUSICCITY'S STATEMENT OF PURPORTED UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW REGARDING VICARIOUS INFRINGEMENT

	MusicCity's Allegations	Plaintiffs' Response
1.	StreamCast does not participate in or control any indexing, searching, copying, transferring, downloading or playing of any of Plaintiffs' files by the general public by virtue of the public's use of the Gnutella-based Morpheus software program.	Controverted. The undisputed facts show that MusicCity participates in and can control the indexing, searching, copying, transferring, and downloading of Plaintiffs' copyrighted works by providing services that enable and facilitate those activities. *See* Plaintiffs' Statement of Uncontroverted Facts in Support of their Motion for Summary Judgment on Liability against Defendants MusicCity Networks, Inc.,

MusicCity Networks, Inc., Kazaa BV, and Grokster, Ltd. ("Pltfs. SUF") 3(p); 4(a)-(f), 4(k)-(l); 6(a)-(b), 6(f), 6(n), 6(p)-(q); 7(a)-(e); 8(c)-(d); 9(a)-(f); 10.

While running the Gnutella-based Morpheus system, a user's computer is in constant communication with MusicCity's central servers and the servers of third parties with whom MusicCity has contracted. Smith Dep. 713:23-719:2 (Terry Decl., Ex. 9, pp. 543-49); Gribble Dep. 217:8-18, 236:2-16 (Terry Decl., Ex. 8, pp. 298, 317); Horowitz Decl. ¶¶ 9, 51-53. In addition to other functions described below, those servers deliver banner and pop-up advertisements to the user's screen. Smith Decl. ¶ 31; Smith Dep. 714:17-718:7 (Terry Decl., Ex. 9, pp. 544-48); Horowitz Decl. ¶¶ 52(b), 52(g). MusicCity's servers also provide changeable graphics for the Morpheus "Home" page, which allows MusicCity "to broadcast messages and information to

Morpheus software users." Smith Decl. ¶ 31; *see also* Smith Dep. 738:25-739:5 (Terry Decl., Ex. 9, pp. 568-69); Horowitz Decl. ¶ 52(a).

In addition, MusicCity has updated Morpheus 2.0 approximately eighteen times between its August 16, 2002 release and the October 4, 2002 deposition of its CTO. Smith Dep. 584:22-585:25 (Terry Decl., Ex. 9, pp. 414-15). Morpheus 2.0 is programmed to have each user's computer communicate with MusicCity's central servers every 24 hours (until recently, each application communicated with MusicCity's servers every hour) to check for the existence of a new version of Morpheus. Smith Dep. 603:8-604:18 (Terry Decl., Ex. 9, pp. 433-34); Gribble Dep. 52:16–53:4, 66:4-67:25, 72:7-73:5 (Terry Decl., Ex. 8, pp. 133-34, 147-48, 153-54); Horowitz Decl. ¶¶ 22-23, 26, 52(a), 52(c). If a new version is available, a user is given the opportunity to download and

install the new version. Smith Dep. 610:24-611:23, 616:20-22 (Terry Decl., Ex. 9, pp. 440-41, 446); Gribble Dep. 67:1-25 (Terry Decl., Ex. 8, p. 148); Horowitz Decl. ¶¶ 26-29. If it wishes, MusicCity can issue "forced upgrades" of Morpheus 2.0 – upgrades that replace the prior version of the software (or simply pieces of the prior version of the software) without the user's intervention or ability to decline. Smith Dep. 650:4-651:7; 661:1-4 (Terry Decl., Ex. 9, pp. 480-81, 491); Horowitz Decl. ¶¶ 7, 21-23, 25, 35-39. By this mechanism, MusicCity could, if it wished, replace the current Morpheus application with a version that implements filtering or "fingerprinting" technology to prevent the distribution or downloading of infringing files. Pltfs. SUF 7(c)-(e); Horowitz Decl. ¶¶ 11, 59-62. In addition, this functionality allows MusicCity, from a central server, to adjust variables that affect how communications (including user search requests) are propagated throughout the

network and add Internet addresses of third-party "bootstrap" servers that the client application can contact to connect to the Gnutella network. Smith Dep. 675:14-18 (Terry Decl., Ex. 9, p. 505); Gribble Dep. 54:13-55:25, 66:4-67:25, 145:24-147:7, 222:17-224:6, 255:19-256:8, 291:19-295:10 (Terry Decl., Ex. 8, pp. 135-36, 147-48, 226-28, 303-05, 336-37, 372-76); Horowitz Decl. ¶¶ 8, 21-23, 40-49.

Moreover, through a portion of the code of Morpheus 2.0, MusicCity has the ability to filter out all search results that do not support metadata in the format used by Morpheus. Smith Dep. 683:22-685:21 (Terry Decl., Ex. 9, pp. 513-15); Gribble Dep. 157:8-160:7, 229:19-24 (Terry Decl., Ex. 8, pp. 238-41, 310); Horowitz Decl. ¶ 41.

Finally, despite having been on notice of the massive infringement committed by users of the Kazaa system, Morpheus 2.0 automatically

searches upon installation for file directories associated with Kazaa and other popular file distribution and copying services (such as iMesh, LimeWire, BearShare, and others), and then automatically makes those files available for copying by other users. Horowitz Decl. ¶¶ 10, 54-58. Morpheus does this even if the user has checked a box in the Kazaa system to "disable file sharing," expressing the intent not to make available to others the files in his Kazaa directory. *Id.* ¶ 55.; *see also id.*, Ex. 5.

2.	StreamCast does not receive knowledge of the indexing, searching, copying, transferring, downloading or playing of any of Plaintiffs' files by the general public by virtue of the public's use of the Gnutella-based Morpheus software program	Controverted. The undisputed facts show that MusicCity has acquired extensive actual and constructive knowledge of infringing uses of Morpheus by its users. *See* Pltfs. SUF 3(a)-(f), 3(h)-(t). MusicCity operated a blatantly infringing "OpenNap" service, and sought to lure and "migrate" OpenNap users and their infringing files to the Morpheus service. Pltfs. SUF 3(c)-(e). After launching the Morpheus service, MusicCity's computers captured data from

the system confirming that users were searching for music of top-selling recording artists. Pltfs. SUF 3(h). MusicCity's users have discussed their distribution or copying of specific copyrighted works in e-mail messages sent directly to MusicCity, and MusicCity has responded to such e-mail messages with advice on how to download the infringing content. Pltfs. SUF 3(j), 3(p). Defendants' executives also have used their systems to search for and download copyrighted works. Pltfs. SUF 3(k). MusicCity's actual knowledge of its users' infringing activity is further confirmed by its Third Supplemental Responses to the *MGM* Plaintiffs' First Set of Interrogatories, which identify dozens of Plaintiffs' copyrighted works in the Morpheus "share" directories of MusicCity's employees. *See* Terry Decl., Ex. 11, pp. 589-94. MusicCity even has promoted Morpheus with materials featuring examples of infringing files. Pltfs. SUF 3(*l*), 3(n). In addition, notices sent to MusicCity by the

Recording Industry Association of America and The Harry Fox Agency, Inc. have identified millions of infringing files available on Morpheus, Pltfs. SUF 3(a)-(b), including files made available via the Gnutella-based Morpheus system. Creighton Opp. Decl. ¶ 12; Charlesworth Opp. Decl. ¶¶ 2-3. Finally, the person on whom MusicCity relies to support this purported uncontroverted fact – its computer expert, Professor Steven Gribble – testified that he has not done any investigation into the issue of MusicCity's knowledge of particular copyright infringements by its users, other than to look for information transmitted by user software to Morpheus servers. Gribble Dep. 287:5-23 (Terry Decl., Ex. 8, p. 368).

3.	The Gnutella-based Morpheus software program does not furnish information to StreamCast regarding file indexing, transfer, copying or	Controverted. The undisputed facts show that each client application is assigned a unique number (a Global Unique Identifier) to identify it to MusicCity. Smith Dep. 720:20-22, 722:2-21 (Terry

playing activities of the program's users.	Decl., Ex. 9, pp. 550, 552); Gribble Dep. 266:2-10 (Terry Decl., Ex. 8, p. 347); Horowitz Decl. ¶ 52(c). Every time the Morpheus 2.0 client is launched, it reports back to one of MusicCity's central servers with the start time and stop time of the user's last session, as well as the client's unique identification number. Smith Dep. 724:20-725:5 (Terry Decl., Ex. 9, pp. 554-55); Horowitz Decl. ¶ 52(c). In addition, MusicCity receives information that identifies precisely which version of the Morpheus application the user is running. Horowitz Decl. ¶ 52(c). Finally, Defendants at all times have had the ability to use their systems like any other user to see that a large proportion and a large absolute number of the available files consist of copyrighted works. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001) ("As a practical matter, Napster, its users and the record company plaintiffs have equal access to infringing material by employing Napster's 'search function'").	

4.	StreamCast does not offer, conduct, or operate any file-indexing service.	Controverted. The undisputed facts show that MusicCity offers services that enable and facilitate file indexing. *See* Response to Purported Uncontroverted Fact No. 1.
5.	StreamCast does not offer conduct, or operate any file-searching service.	Controverted. The undisputed facts show that MusicCity offers services that enable and facilitate file-searching. *See* Response to Purported Uncontroverted Fact No. 1.
6.	StreamCast does not offer, conduct, or operate any file-sharing service.	Controverted. The undisputed facts show that MusicCity offers services that enable and facilitate the searching, copying, and transferring of files, sometimes even without a user's knowledge or prior consent. *See* Response to Purported Uncontroverted Fact No. 1.
7.	StreamCast cannot block, prevent or control uses of the Gnutella-based Morpheus software program by the	Controverted. The undisputed facts show that MusicCity does have the ability to block, prevent or control uses of the Gnutella-based Morpheus system by the general public.

	general public.	*See* Response to Purported Uncontroverted Fact No. 1.
8.	StreamCast cannot stop any user of the Gnutella-based Morpheus software program from connecting to the Gnutella network.	Controverted. The undisputed facts show that MusicCity could stop its Morpheus users from connecting to the Gnutella-based Morpheus network. Smith Dep. 650:16-651:7 (Terry Decl., Ex. 9, pp. 480-81); Horowitz Decl. ¶¶ 6, 7, 18-20, 21-23, 25, 35-39, 52(e).
9.	The Gnutella-based Morpheus software program can operate without support from, or involvement by, StreamCast.	Controverted. Permanently cutting off MusicCity's support of and involvement in Morpheus would result in the degradation of the Morpheus system because, for example, bugs would not be corrected and each user's computer would no longer be able to communicate with MusicCity's central servers every 24 hours to check for new versions of Morpheus, as currently occurs. *See* Horowitz Decl. ¶ 50; Response to Purported Uncontroverted Fact No. 1.
10.	Users of the Gnutella-based Morpheus software program can find and transfer files without the assistance of StreamCast.	Controverted. Permanently cutting off MusicCity's support of and involvement in Morpheus would result in the degradation of the file-searching and trading functionality because, for example, bugs would not be corrected and each user's computer would no longer be able to communicate with MusicCity's central servers every 24 hours to check for new versions of Morpheus, as currently occurs. *See* Horowitz Decl. ¶ 50; Response to Purported Uncontroverted Fact No. 1.

11.	If all connection to StreamCast were severed, the Gnutella-based Morpheus software program would still function as it does when StreamCast servers are available, except that advertising and graphics would not be displayed on the user interface, and ceratin often unrelated services would be unavailable.	Controverted. The undisputed facts show that if all connection to MusicCity were severed, Gnutella-based Morpheus would not still function as it did when MusicCity servers were available; for example, each user's computer would no longer be able to communicate with MusicCity's central servers every 24 hours to check for new versions of Morpheus, as currently occurs. *See* Horowitz Decl. ¶ 50; Response to Purported Uncontroverted Fact No. 1.

12.	If all connection to StreamCast were severed, users of the Gnutella-based Morpheus software program could still engage in searching and file transfers over the user network.	Controverted. Permanently cutting off MusicCity's support of and involvement in Morpheus would result in the degradation of the file-searching and trading functionality because, for example, bugs would not be corrected and each user's computer would no longer be able to communicate with MusicCity's central servers every 24 hours to check for new versions of Morpheus, as currently occurs. *See* Horowitz Decl. ¶ 50; Response to Purported Uncontroverted Fact No. 1.

Fact No. 1.

13.	StreamCast has no involvement in the searching, finding and downloading of files that are performed by users of the Gnutella-based Morpheus software program.	Controverted. The undisputed facts show that MusicCity offers services that enable and facilitate the searching, finding and downloading of files by users of the Gnutella-based Morpheus system. *See* Response to Purported Uncontroverted Fact No. 1.

Deposition of
Aram Sinnreich
September 25, 2002

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Q. Did you talk to anyone – did you talk to Tom Petty about this to find out how – what he knows about how the song or the file for the song wound up on MP3.com.

A. I did not.

Q. Have you spoken with anyone connected with Tom Petty or his management to find out how the song "Surrender" was placed on MP3.com for free download?

A. I don't believe so.

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Q. Do you know for a fact how much Wilco paid Reprise for the masters that they repurchased in August 2001?

A. I know it was widely reported to be $50,000.

Q. Widely reported in the press?

A. Yes.

Q. So you are basing your testimony on what they paid to repurchase – or purchase the masters on what you read in the press.

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A. The press and industry news groups and scuttlebutt. People mention – as I'm sure you are

aware, at the time that the deal happened everybody in the digital music industry was talking about it. The phrase $50,000 was frequently used in the discussions and news groups devoted to the subject the number was also used.

Q. But you have no personal direct knowledge of that, do you?

A. No.

Q. Have you ever visited Wilco's website?

A. Yes.

Q. Let's look at the next page. Let's see. Paragraph 10 you write:

"In September, the band made all of capital Y, capital H, capital F available in digital format on its website prompting 200,000 unique visitors that month along."

How do you know that?

A. That was a number quoted in the press based on I believe Mediametrics numbers, although it could be based on Nielsen net rating numbers. I don't remember which measurement organization was the source.

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Q. Do you know if it was the – there was any measurement organization involved as opposed to it being just the band issuing a press release saying they had 200,000 visitors?

A. I don't recall. But it's a matter easily verified.

Q. I understand that. But as you sit here today you don't know, do you?

A. No.

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Deposition of
Scott Egbert
September 23, 2002

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Have you done peer-to-peer file sharing from the Grokster service?

MS. WEXLER: Again, objection to the term "service."

A. I have.

Q. Why don't you tell me how you've done that.

A. Well, two ways. I've not done it

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with music just because I just didn't want to. Not because I'm copyright wary or anything. I just didn't feel like it. What I have done is I downloaded some porno from there one time because I just wanted to see if you can really do it, which you can. I got some beauties.

But then the other thing I did was one of the featured Gig America artists I did a search on one time to see if there was files available and stuff like that.

Q. That is music.

A. Yes.

Q. I thought before you said you hadn't done it to look for music.

A. Well, not to, like go get a Metallica song or something like. And again, not for any good reason. It just seems like a big

pain. I don't know. To me it's just -- to me the whole thing seems like more trouble than it's worth.

And I did have Napster back in the day, and that's kind of why. Just very complicated. The interface just really wasn't too happening. And I'd have to really want it

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badly to do that. I got enough music type of thing.

Q. Have you ever gotten reports from Grokster about the availability of GigAmerica artists' songs on the peer-to-peer network?

A. No.

* * * *

Deposition of
Janis Ian
September 19, 2002

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Q. Do you know what StreamCast is?

A. Peer-to-peer.

Q. Do you know anything more than that?

A. Nope.

Q. How about KaZaA? Do you know anything about that?

A. Also peer-to-peer.

Q. Do you know anything further than that?

A. No.

Q. How about Grokster?

A. No. Well, I do know that I get fans telling me that they heard music on Morpheus, is what they usually say.

Q. I take you've never used KaZaA yourself?

A. No.

Q. Or Grokster?

A. No.

Q. Or Morpheus?

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A. No. I'm on a modem; it's way too slow.

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You have no idea whether there are people who have obtained all of the Janis Ian music they want in the form of free downloads from StreamCast?

MR. ADAMS: Same objection.

A. I have no idea, no.

Q. Or from KaZaA?
A. I wouldn't know that either, no.
Q. Or Grokster?
A. No.
Q. Or any other P2P network?
A. No, but frankly I'd be very happy if my name was out on that many P2Ps because it's not a very well-known name anymore.
Q. Regardless of whether you'd be happy, you don't know, correct?
A. I don't know. I have no knowledge of that.

I do need a break, though.

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Deposition of
Brewster Kahle
September 18, 2002

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Q. Have you made any other efforts to make the Prelinger files available through a peer-to-peer file-sharing network?
A. Nothing of that scale.
Q. Have you done anything, or has the Internet Archive done anything, to make the Prelinger films available through the Morpheus system? In any of its incarnations.

MS. COHN: I'm going to object to the term "Morpheus system" as vague and ambiguous.

THE WITNESS: The only time we have tried running software on a box with the Prelinger films, with any duratic.., to try to offer those materials -- was with Flycode.

MR. THOMAS: Q. Do you know whether any of

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the Prelinger films are available for downloading on Grokster, for example?

MS. COHN: Objection. Vague and ambiguous as to the term "on Grokster."

THE WITNESS: I'm unaware.

MR. THOMAS: Q. And do you know whether any of the Prelinger films are available to be downloaded by users of Morpheus?

MS. COHN: Objection. Vague and ambiguous for "users of Morpheus."

MR. PAGE: Could you read the question back?

(Record read)
MS. COHN: Renew my objection.
THE WITNESS: No.
MR. THOMAS: Q. Do you know whether any of the Prelinger films are available to be downloaded by users of KaZaA?
MS. COHN: I'll renew my objection. Vague and ambiguous as to "user of KaZaA."
THE WITNESS: I don't know.
MR. THOMAS: Q. Have you ever used Grokster?
A. Not that I'm aware of.
Q. Have you ever used Morpheus?
A. Yes. I have used software. I have downloaded Morpheus software, and run it.

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Q. Have you ever used KaZaA software?
A. I'm not sure all the relationships between the software. So I'm not sure.
Q. Have you ever downloaded software from KaZaA, or logged on to the KaZaA web site?
MS. COHN: I'm going to object to the term "downloaded from KaZaA" as vague and ambiguous.
MR. PAGE: Same objection to "logged on to KaZaA web site."
THE WITNESS: I have visited many web sites, including KaZaA.
MR. THOMAS: Q. Have you ever run the KaZaA software?
A. Not that I'm aware of.
Q. You mentioned that you did download the Morpheus software. Did you run the Morpheus software?
A. Yes.
Q. When was the first time you ran the Morpheus

software?
A. I don't remember.
Q. When was the last time you ran the Morpheus software?
A. Months ago.
Q. What did you do with the Morpheus software? What did you use it for?

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A. I used it to try to understand the software, so I tried to exercise the software.
Q. Did you perform any searches?
A. I typed things in, and I got responses. I don't know – I don't understand exactly how the whole thing works. I don't know if it actually is searching in the precise technical way.
Q. Do you recall which version of the Morpheus software you ran?
A. No
Q. Over what period of time did you use the Morpheus software?
A. Over a couple of weeks; maybe a month. Maybe a couple of months.
Q. Do you recall what you typed in as search request?
MS. COHN: Objection. He's already testified that he didn't know whether something was a search request or not, so you are assuming facts not in evidence.
THE WITNESS: I typed in words into the box, and tried to get results back that were likely to retrieve results.
MR. THOMAS: Q. Do you recall what words you typed in, in the hopes of obtaining results?

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A. Ones that would lead to downloading pornographic short films.
Q. Anything else?
A. Not that I recall.
Q. Did you make any files available to be downloaded by other Morpheus users?
A. I don't know. I downloaded and watched several movies.
Q. And the movies that you downloaded and watched: Were they of the type that you just described?
A. Yes.
Q. Any other movies that you recall downloading and watching?
A. No.
Q. Did you download any music?
A. No. Not that I recall.
Q. In the course of typing in words in the hope of obtaining a response – what some people might call "searching" – did you make any effort to determine whether the Prelinger films were available to be downloaded?
MS. COHN: Objection. Argumentative.
THE WITNESS: Not that I recall.
MR. THOMAS: Q. In the course of using the Morpheus software, did you make any effort to determine

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whether any materials that you would regard as public domain materials were available to be downloaded?
A. I was not – I was looking at the software and trying to understand what it did. So that was my –

I downloaded some porn films and watched them.
Q. I'm not sure that answers my question.
Could you read the question back, please?
(Record read)
THE WITNESS: I was not thinking about whether these materials were public domain or not.
MR. THOMAS: Q. Do you have any knowledge regarding the portion of files that are available for downloading by Morpheus users that consists of public domain materials?
MS. COHN: Objection. Calling for a legal conclusion.
THE WITNESS: I don't know.
MR. THOMAS: Q. Do you have any knowledge regarding the portion of files that distributed or available for downloading on Grokster or KaZaA that consist of public domain materials?
A. I imagine there are materials that are public domain available for users of that software.
Q. Do you know, one way or the other, whether public domain materials are available to be distributed

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or downloaded by users of Grokster, KaZaA or Morpheus?
MR. PAGE: Could you read that again?
(Record read)
MS. COHN: Objection. It is vague or ambiguous. Also compound.
THE WITNESS: I would be surprised if the Prelinger files were not available at least on these systems.
MR. THOMAS: Q. Let me break my question down to avoid the problem of it being compound.
With respect to Morpheus and Morpheus users,

do you know whether any of the Prelinger films are available to be downloaded by Morpheus users?
A. I have not personally used Morheus to find and download Prelinger films – is the answer. So in terms of my uses of Morpheus, I did not find and download Prelinger films.
Is that what you are asking?
Q. I that that's part of it, but even putting aside your own use of the system, do you have any knowledge about – as to whether even one of the Prelinger films ever has been downloaded by any user of Morpheus?
MR. PAGE: Object as vague and ambiguous.
MS. COHN: Join in the objection.

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THE WITNESS: I haven't talked to anybody that has used Morpheus personally, that has downloaded Prelinger films.
MR. THOMAS: Q. Do you know whether any of the Prelinger films ever have been available to be downloaded by users of Grokster?
MR. PAGE: Could you read that back?
(Record read)
THE WITNESS: I don't know anybody that has ever used – I'm not familiar with anybody that has ever used Grokster. We have used peer-to-peer systems to distribute these movies, and we find that we would like to see these peer-to-peer systems grown to be able to distribute more of these types of materials.
These specific systems I have very little experience with.
MR. THOMAS: Q. I don't know if that answers the question. Could you read the question again?

(Record read)
THE WITNESS: I don't know any users of Grokster. So no, I don't know of any people that have downloaded Prelinger films through Grokster.
MR. THOMAS: Q. And it is also true that you don't know whether any of the Prelinger films have been made available by any users to be downloaded by others?

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on Grokster.
A. Since I don't know anybody that has used Grokster, I don't know anybody who has downloaded any Prelinger films. I would be very surprised if the Prelinger films were not actively put on these systems.
Q. But the fact is, you don't know whether the Prelinger films are actively put on these systems; right?
MS. COHN: Objection. Asked and answered. And now you are just arguing with the witness.
THE WITNESS: I don't know anybody that has used Grokster. Do you use Grokster?
MR. THOMAS: Q. My question is, do you know whether the Prelinger films – any of the Prelinger films – have been traded on Grokster?
MR. PAGE: Objection. Asked and answered. He has been asked, and he has no knowledge.
MR. THOMAS: He hasn't said that yet.
THE WITNESS: I don't know anybody who has ever used Grokster. So that is correct; I do not know anybody who has ever downloaded or watched a Prelinger film using Grokster software.
MR. THOMAS: Q. Is it also true that you don't know whether any of the Prelinger films have been made available to be downloaded by users of Grokster?

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MR. PAGE: Objection. Asked and answered.
Could you read that back?
(Record read)
THE WITNESS: Since I don't know anybody that has used Grokster, I don't know anybody that has downloaded or watched Prelinger films.
MR. THOMAS: Q. My question was really making a distinction between "download" and people that make things available.
You testified earlier that with Flycode you ran the Flycode software, and you had some films on your hard drive that you made available to be downloaded by others.
A. Yes.
Q. And so in the last couple of answers you have talked about – you didn't know whether anybody has downloaded films.
All I'm asking is, do you know whether anyone has made any of the Prelinger films available to be downloaded by other people?
MS. COHN: Other than Brewster, using the Flycode software?
MR. THOMAS: No, I mean on Grokster.
THE WITNESS: Since I don't know anybody that has used Grokster, I don't know anybody who has made the

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Prelinger films available to other people over Grokster.

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Deposition of
Sean Mayers
September 20, 2002

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Q. Have you ever searched for anything using the Grokster client?
A. Yes, I have.
Q. And what did you search for?
A. Could you guess? JIVE Player files.
Q. Was the search that you entered, once again, either "JIVE PLAYER" or the keyword "JIVE"?
A. Yes, it was.
Q. And did you search for the Little Romeo music video?
A. In that case, no, I did not.

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Q. What did you search for?
A. JIVE Player files.
Q. Generally?
A. Yes, just - -
Q. Okay
A. -- JIVE Player files.
Q. No specific artist.
A. No.
Q. You didn't search for any specific file name?
A. No, I did not.
Q. Do you recall whether any of your search results included non-JIVE Player files?
A. Yes.
Q. Yes, you recall or yes, they did?
A. Yes, I recall there were other files as well.
Q. Did you download any of those files?
A. No, I did not.

Q. What were those files?
A. I don't recall.
Q. So, it fair to say that you have never downloaded anything other than JIVE content from any of the defendants' networks; is that fair?
A. Yes, that's fair to say.
Q. Have you ever done anything to investigate or survey what content, other than JIVE content, users are distributing or

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copying on defendants' systems?
A. No, I have not.
Q. So, again, putting aside JIVE content, you don't know whether any users are using defendant systems to download other non-infringing content?
A. Well, I read the news. I mean, I hear what goes on in terms of the Internet at large and peer to peer.
Q. Do you have personal knowledge?
A. Do I have personal knowledge, in terms of?
Q. Do you have personal knowledge of whether any users are using the defendants' systems to download non-infringing content that is not JIVE Media content?
A. Okay, that was a long question –
Q. I'm sorry.
A. -- which was kind of unclear.
MR. HARDY: Could you read the question back.
THE COURT REPORTER: Sure.
(Readback by reporter)
MS. WEXLER: I'll just object to the extent the question is vague.
[Objection taken]
A. Yeah. No, not really. I mean, you're asking me to speculate what other people are doing with this technology. I don't know

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Deposition of
Gregory B. Newby
September 23, 2002

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Q. Does Project Gutenberg or any of the people affiliated with it make any effort to make the Project Gutenberg works available on peer-to-peer networks?
A. Yes. I don't currently have the system running but for several months I had posted all of Project Gutenberg's materials to the Morpheus and Kazaa networks.

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And the reason why it is not available currently is we changed some software and upgraded one of the systems. I haven't put it back on there yet. So the answer is yes, and the person who did it was me.
Q. When did you begin doing that?
A. I think I had it running in about February of this year and kept it running through most of the summer.
Q. Do you remember when you stopped for the software change?
A. Not specifically. I believe it was June or July.
Q. And where was the computer from which you were distributing these works?
Q. It was located in Manning Hall which is my school's building at the North Carolina campus.
Q. Just so I'm clear, you testified that you were making these works available both on Morpheus and Kazaa; is that correct?
A. That's what I said but I thought it was the same thing. I thought if maybe I'm incorrect and I may not remember correctly. I thought that files in one were

available to the other.
Q. My understanding is that beginning in March Morpheus became part of the Gnutella network and Kazaa remained where Kazaa was. But it is your recollection and understanding that counts here.

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A. I think it was likely to have been Kazaa, but unfortunately I have no way of going back and verifying because computer has been wiped. But I don't recall that anything happened in March that made things change.

* * * *

Q. During the six or so month period during which you were making the Project Gutenberg works available on let's call it Kazaa, did you acquire any information about the number of downloads of those works that other people had executed.
A. I acquired only very incomplete information. I was hoping to get better. What I discovered was that I would start up the software and the computer system was located outside of my office. It was in a research project office. I would start up the software, go away, come back the next day or the next week and sometimes the software would still

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be running. More often it would have crashed and left no records. When it was still running I was always curious to see and look what had been downloaded. Unfortunately -- so two unfortunate things. One is that the software would crash and I wouldn't know necessarily when it crashed, nor would I know what had happened, what software or what files had been downloaded. But also I discovered unfortunately there didn't seem to be a good way of exporting the download records, say,

to a text file or something and it is possible there is. I just didn't see it in the software. So I didn't have a good way of seeing what had been downloaded specifically for those two reasons. But I did check quite regularly, certainly at least once a week, and it did stay running on several occasions from week to week. And I found that the profile of downloads was about what would be expected, the Time Machine was very popular, Alice in Wonderland very popular, some of the more well-known titles. Dante I think was one. But I don't have specific numbers and I very much wish I did, not so much to profile the usage, because I'm not a big believer in trying to look forward to book selection based on popularity, but I think it would be useful just to talk about and say this is, this is where some of our interests are and this is some of what's happened.

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Q. And how many indications apart from the class demonstration did you get on these systems and try to find Project Gutenberg works?
A. You said "how many indications." Did you mean how may occasions?
Q. How many occasions, yes.
A. About half a dozen I would estimate in the period we are talking about between the two declarations.
Q. Do you recall what works you looked for?
A. Yes. Alice in Wonderland is one of my favorites. I also looked for Bruce Sterling's, The Hacker Crackdown to find out is one of the copyrighted works had been distributed.
Q. And had it?
A. I didn't find it.

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Q. Any other works you recall looking for?
A. I recall the only other one I recall specifically is Dante's Divine Comedy and part of why I was interested was just to see if the multiple languages is available and if there was an Italian copy. Unfortunately I can't recall if I found the Italian version. I do recall finding the English one.
Q. I take it that you downloaded the file that contained the English version?
A. Yeah. I'm sorry. I can't recall now if it had the Project Gutenberg header on it or not. I think it probably didn't but I don't recall.
Q. Any other works besides those three that you recall searching for?
A. I don't recall any other titles. I think I did search for a few other things, and I think I also probably repeated my search for Metallica and possibly some other non-Project Gutenberg content. I thought of that as seeing what was available in terms of Project Gutenberg but over time needing to compare that to other types of content or non-Project Gutenberg content.

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Q. Did you have any information on either the gross number or proportion of users of the Morpheus, Kazaa or Grokster applications that make available Project Gutenberg works on their hard drives?
A. No. I have no idea.

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Deposition of
Richard Prelinger
October 1, 2002

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Q. What is your understanding of Grokster?
A. I have no understanding of Grokster.
Q. Do you know whether Grokster is distributing software to enable users to communicate on the Fasttrack Network?
MS. COHN: Objection. Asked and answered.
MR. BLUM: I did not ask that question.
MS. COHN: You asked him if he knew what Grokster is. If he doesn't know what is is, how can he know what it does?
MR. BLUM: I'm entitled to specifically inquire as to his knowledge.
Q. So the answer is no, sir?
A. The answer is no.

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Is it your understanding that a peer-to-peer network allows users to, quote, share files with each other?
MS. COHN: Renew my objection.
MR. BLUM: Q. You may answer.
A. As I said before, I don't have much understanding of the technology around peer-to-peer.
Q. My question, sir, is it your understanding – it's either a yes or no. Is it your understanding that a peer-to-peer network allows users to share files with each other?
A. I don't know.

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A. No.

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Q. Do you know whether any user of the Grokster software has made available to share any Prelinger film?
A. No.
Q. Do you know whether any user of the Grokster software has downloaded a Prelinger film using the Grokster software?
A. No.
Q. Do you know whether any user of Music City, before they started using –strike that question.
Do you know whether any user of Music City software has made available for downloading any

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Prelinger film?
A. No.
Q. Do you know whether any user of Music City software has actually downloaded a Prelinger film?
A. No.

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Deposition of
Aram Sinnreich
September 25, 2002

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Q. Prior to including this text in your declaration and signing it, did you undertake an investigation to determine if in fact that was the case?
A. Yes.
Q. What did you do?
A. I looked at the press materials available on GigAmerica where they talked about it.
Q. Did you go to any GigAmerica sites to verify this?
A. No. Not to verify this sentence.
Q. Did you go to Grokster to verify whether it was the case that Simple Plan or Grade 8 were offering free downloads of their songs from their current albums on Grokster?
A. No, I didn't.
Q. So your only basis for knowing whether or not this is correct is A, Mr. Page asked you to put this in the declaration and B, you saw in press reports from GigAmerica where they claim this to be the case.
A. That's correct.
Q. As you sit here today do you know whether Lava/Atlantic Records or the bands Simple Plan and

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Grade 8 have authorized the free downloading of songs from their current albums on GigAmerica?
A. I believe that the press literature included quotes from Lava executives. So on the basis

of that I would say that I – I feel reasonably confident that that is the case.

Q. And that those press statements contributed to Lava or Atlantic representatives were specifically with reference to the offering of downloads on GigAmerica or the existence of a relationship for promotion with GigAmerica or you just don't remember?

A. I can't say for sure.

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I am drawing your attention to Paragraph 33 on Trymedia Systems. The video games – let me do a little foundational questioning.

You have identified a handful of video game publishers on Lines 24 and 25.

A. There is also a typo on Line 25. The name of a company is Infograms, not Infogames.

Q. That's true, it is. Thank you.

A. Sorry to interrupt.

Q. No problem. The games from Ubi Soft, Infograms, Digital Fusion and 3D Groove that Trymedia Systems makes available on a try before you buy basis on FastTrack and Gnutella, have you – let's start again.

With respect to those games, did you conduct any inquiry in preparing your declaration to go onto FastTrack and Gnutella to see if in fact the games

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from those publishers were being made available?

A. No, I didn't.

Q. How do you know this to be the case?

A. I have had seen – actually, only a week or two ago Trymedia released a press release saying

that their trial with Infograms, I believe, had a 10 percent conversion rate. So I have seen press releases. I have seen press accounts. I have spoken with video game analysts who have told me about this effort.

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Q. Actually, one final question on that. You said at the last sentence of that paragraph that five million legitimate copies of the Trymedia games have been attributed in this manner. Is that five million copies of the try before you buy or five million full copies have been purchased using this program?

A. The former.

Q. So as you sit here today you don't know how many actually sales transactions Trymedia has generated through using FastTrack and Gnutella P2P networks to distribute games.

A. No. But if the 10 percent conversion rate that they found with Infograms translates to similar

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numbers with other developers, one can assume that half a million copies have been sold.

Q. As an expert in this field and a researcher with Jupiter for a period of years, would you normally leap to that conclusion without further research?

A. No.

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Deposition of
Steven Gribble
October 9, 2002

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Q. I'm going to ask you one question about the Ninja Jukebox article that Mr. Frackman asked you about, and to save time I'm not going to mark this as an exhibit. But let me give it to you though and ask this says the Ninja Jukebox?

A. Which page?

Q. Well, first on the cover. I just want to see. It says, Ian Goldberg, Steven D. Gribble, David Wagner and Eric Brewer. It's dated 1999 on the cover. Did you have a hand in writing this document?

A. I did.

Q. Generally speaking, as compared to the other four, what was your level of participation in the drafting?

A. Fairly equal to the other authors on the list.

Q. Did you review and approve the final version of it?

A. I think so.

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Q. I just want to ask you about one sentence. If you turn to the third page, you'll see in bold a section 2.1.

A. I see that.

Q. If you go to the paragraph just above that, I'm going to read to you the second sentence. As the evolution of the Jukebox has explicitly demonstrated, applications are not cast

in stone and services should not remain immutable once they have been released and are in use by applications and users.

Is that a statement that you endorse and agreed with at the time that it was made in this article?

A. At the time, yes. Bear in mind that that statement's prior to the context of this research program. But at the time, with respect to Ninja Jukebox, that statement was accurate.

Q. Do you still agree with that statement today?

A. I believe over time I've become aware of even more potential pitfalls of upgrading applications over time, including such things as security, trust, privacy, and scaleability that I didn't consider fully in this paper. So I think

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my opinion's grown over time and changed in that specific – let me look back at that statement.

Q. What I'd like to know, as you read the statement, what in it do you now disagree with?

MR. STUART: I think he's answered that.

A. I believe that applications are not cast in stone.

Q. You still agree with that?

A. Most applications that I know of have new versions released over time and therefore that's manifestly true. Services should not remain immutable once they have been released. I believe that's true because services have bugs in them that need to be fixed and new features that need to be added to it.

Q. And then we have the period?

A. And then we have, and are in use by

applications and users. So I believe it's true that applications and services should evolve over time. I think since I wrote the paper I've become more aware of all sorts of considerations of doing that automatically versus nonautomatically, that you have to take into account. But I still believe it's true that applications should change over time.

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Deposition of
Darrell Smith
October 4, 2002

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Q. At your prior deposition, you testified, I believe -- and correct me if I get this wrong -- that MusicCity made some 15 or 16 upgrades to Morpheus 2.0 within the first few days of its launch?

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A. That's correct.
Q. Were those upgrades related to correction of the Jtella code bugs that you've just described?
A. Some of it was. And the other was to World's own code.
Q. Does that mean that other of the upgrades were directed towards correcting bugs in Wurld Media's own code?
A. Yes. Some of them were for dealing with their bugs, and others were for dealing with Jtella.
Q. Since your deposition -- so since August 27th, have there been any further upgrades to Morpheus 2.0?
A. Yes. Because I -- if I recall, during my deposition, we were at approximately version 2 -- 2.0.1.5, and we're currently at 2.0.1.8.
Q. Let me see how to describe this.
2.0 is the major version number?
A. Yes. And those other -- the last two digits are basically revisions of the bug -- of any bug fix.
Q. Okay. So version 2.0.1.5 is, if I

understand this correctly, four bug fixes prior to version 2.0.1.8?
A. That's correct.

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Q. What were the nature of the bugs that were corrected in those updates?
A. More memory leaks with Java, some issues that they were having with Sun's code that was calling -- that was causing network disconnects.
Q. Meaning users would physically disconnect from the network?
A. No. Users weren't being disconnected. The application -- depends upon how you think of it.
The amount of time that Morpheus would connect to some clients would be normal; the amount of time it would connect to other clients was kind of erratic, and it wasn't making any sense. And they found that there was some issues with Sun, and they tracked it down and fixed it.
Q. So the disconnects from the network you're referring to were those periods of time when Morpheus 2.0 applications connect and communicate with MusicCity's central servers?
A. No. Connect to other Gnutella clients.
Q. Okay. I understand.
When I say "disconnect from the network," the clients are not, in fact, disconnecting from the network. They're losing connection with other users while still maintaining overall network connection?

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A. That's correct.

Q. Is there any documentation reflecting the bugs that you've described thus far?
A. No, there isn't.
Q. Do you know if there's any documentation at Wurld Media regarding these bugs?
A. That, I wouldn't know.
Q. Was it Wurld Media that did the development of the fixes for these bugs?
A. That's correct.
Q. How do you personally communicate with the developers at Wurld Media?
A. Through telephone.
Q. Through telephone?
A. Yes.
Q. You no longer communicate with by e-mail?
A. We've always communicated with Wurld via telephone.
Q. Is there a reason that you communicate by telephone as opposed to by e-mail?
A. Because the amount of bugs is so high that our board requested that we did something extremely strong to help them through the process and give them -- give us turnaround information quicker.

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Q. What is it that your board requested you do?
A. That we basically fix the problems with the application as soon as possible, and so both companies initiated a process of having a morning phone call, every single morning, to get an overview of "Have the bugs been fixed? And what time will we get the next release?" -- not release to the public,

but internal release, so we can see if the bugs have been fixed.
Q. So it is the case that, then, Wurld would create a fix for a bug, send you a revised piece of code, and you would internally review and test that and then --
A. They basically -- We'll talk to Wurld in the morning, they will basically tell us about the bugs that they had worked on from the previous day, and then, from that point, we would then log in to one of their servers to download the release build for that day.
Q. Is this a process that's still going on -- these morning calls?
A. Yes, it is.
A. So the problem of identifying and fixing bugs is a cycle that MusicCity and Wurld Media

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continues with, even today?
A. That's correct.

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The web pages in the Morpheus 1.9 and Morpheus 2.0 client applications can have JavaScript in them?
A. Yes, that's correct.
Q. And MusicCity can determine whether to include that JavaScript or not?
A. That's correct.
Q. And the JavaScript can be used to send a pop-up box, for instance, to a user of the Morpheus 1.9 or Morpheus 2.0 application?

A. That's correct. That's how the pop-ups are coming from the advertisers.
Q. And it's not necessary for a user to actually click on something in those web pages in order to receive the pop-up box? Merely passing their mouse or the cursor over one of those JavaScript could trigger the pop-up box?
A. We're not doing that, but JavaScript could do that.
Q. MusicCity could have a pop-up box appear offering a Morpheus 1.9 user an upgrade anytime that user passed their cursor over an JavaScript in one of the web pages?
Yes, that's possible.

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Q. And because the JavaScripts -- because you can -- Strike that.
MusicCity could program the JavaScripts so that these pop-up boxes offering an upgrade to Morpheus 1.9 would continue to appear regularly unless the user accepted the upgrade, is that correct?
A. Kind of. Meaning that if they accepted the upgrade, then they wouldn't be running the other application to see the pop-ups, but if they did run the application of the old version, they would still see the pop-ups.
Q. That's right.
A. Even if the program was installed -- the new version.
Q. MusicCity could program the JavaScripts and Morpheus 1.9, such that if a user did not accept the offered upgrade, the user would continually -- continually see additional pop-up boxes, is that

correct?
A. That's correct.
Q. And these pop-up boxes could be set to be the full computer screen, if MusicCity so chose?
A. It would be annoying, but it's possible.
Q. Granted, it would be annoying.
But if MusicCity wanted a 1.9 user to

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upgrade and wanted a 1.9 user to upgrade badly enough, it could bombard that user with pop-up boxes offering that upgrade until such time as that user accepted the upgrade?
A. It's theoretically possible.
Q. There's no technological reason why you couldn't do that?
A. That's correct.
The only thing that would keep us from doing that is all the new software that a lot of the users are downloading that will kill the pop-up before it occurs, which can be seen in our records this month for our advertising dropping.
MR. BAKER: Don't you have that?
MR. FABRIZIO: No. I use the pop- -- I let the pop-ups come.
Q. BY MR. FABRIZIO: But certainly some very substantial portion of your users don't use software to scrub out the pop-up boxes?
MR. BAKER: I'll object to that. It calls for speculation.
Go ahead.
THE WITNESS: That, we're not sure of, because from the numbers that we're seeing, there has been concern -- major concern about that in the last few

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weeks.
Q. BY MR. FABRIZIO: Absent users taking steps by using third-party applications to scrub away pop-up boxes, MusicCity could continually bombard a user with pop-up dial-boxes inviting that user to upgrade until that user accepted the upgrade?
A. Yes. Either that or stop using the application and use something else.

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Deposition of
Leonard Kleinrock
September 27, 2002

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Q. I think maybe I wasn't clear in my question.
What body of code would you need in order to make that determination?
A. I can't tell right now, but I believe I need to look at the FastTrack code to see exactly how it was done.
Q. And you're not referring to the application; you're referring to the source code; is that correct?
A. That's correct.
Q. Do you have any reason to believe that Grokster has access to the FastTrack source code?
A. No.
MR. FABRIZIO: I'll object to the form of the question. Physical access or legal right to access? It's ambiguous.
MR. PAGE:
Q. Do you have any reason to believe that Grokster has ever possessed the source code for the Grokster application?
A. No.
Q. If I gave you a copy of the Grokster application as distributed to the public, would you be capable of making modifications to that software that would enable it to differentiate between infringing and noninfringing content?

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A. Let me understand that question. Are you

saying I can make arbitrary changes to the code and install it on the client?
Q. If I gave you only the application code.
A. I believe I could.
Q. So it's your testimony that if you had access only to the application that users get by downloading, you could modify that code in order to differentiate between infringing and noninfringing content?
A. I believe I could.
Q. How would you do that?
A. Put a filter in, get a list of allowable or disallowable content and pass the search, the download and the upload, one or the other or many of those, through that filter.
Q. And you would build this as a standalone filter separate from the application?
A. That's implementation detail. You said if I had -- Did I understand I have access to one client or all the clients?
Q. Just the Grokster client.
A. The Grokster client?
Q. Yes.
A. And further explanation, could I then install that client on every Grokster machine?

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Q. Let me ask that question.
Would you have the capability of installing that client on every machine once you altered it?
A. That's an open-ended question. I don't know if the users would allow me. I'm not sure if there's a code or a key I need to replace the software.
Q. Let's start with a single client.
Suppose I sat you down with a computer running

Windows XP and a copy of the Grokster application and told you your task was to cause that Grokster application to operate in such a way that it would be able to connect to other FastTrack users and download only noninfringing files, could you do that?

A. Again, there are some assumptions we have to make.

First assumption is, if I altered the code, would it be able to talk to the other clients? I don't know if there's any controls in that that would prohibit that.

Secondly, if I did it on a single client, certainly could affect that client's behavior and would have implications for other clients trying to download information from that client. I could put filters in for both of those cases.

Let me modify all of that by saying, you're asking

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me to design on the fly here, so there are issues that may need to be considered I've not thought about in this short exchange we've had.

Q. Let's see if we can think of some of those issues. Are communications to and from Grokster clients encrypted?

A. I believe they are.

Q. And is it your testimony that you could build a standalone filter that could take that encrypted stream and differentiate between requests for infringing and noninfringing content?

A. If I had a way for looking at the metadata, some other aspects of the files -- There's two issues.

One, can I identify which files are infringing?

Second issue is, once I've done that, could I then

create a procedure which would affect the nonpassing of those infringing files?

The second in my mind is fairly clear that we could, because the client wouldn't know -- Never mind. It's fairly clear to me.

Q. Let's look at the first. Could you identify which files are -- Strike that. Let me be more clear.

Could you, in looking at the inputs and outputs from the Grokster client -- again, I'm talking about just having the binary of the application, could you, by

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looking at the inputs and outputs from that software, determine the identity of the files being searched for?

MR. FABRIZIO: I'm going to object to form. You've limited it to inputs and outputs. That's not what you've done heretofore.

MR. PAGE:

Q. Can you answer the question?

A. Repeat the question, please.

Q. Let me rephrase it.

Again, I'm talking about a hypothetical situation where you have a computer running Windows XP and a copy of the binary of the Grokster application.

How would you go about identifying the content of search requests being passed to and from that client?

A. Depends if the metadata are encrypted or not. From the metadata, I could tell what kind of file it was.

Q. And in the Grokster application, is the metadata encrypted or not?

A. I forget. Actually, I believe the user can affect what's in the metadata, which suggests that it's not encrypted. If it's not encrypted, I could certainly

identify the file and put it past a filter.
Q. I wasn't very clear with my question.
Do you know whether the metadata contained in

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messages sent out and received by the Grokster application is encrypted?
MR. FABRIZIO: I'll object to form, again, for the same reason, switching back and forth between having the client running on a computer and only looking at the inputs and outputs.
MR. PAGE: That's not an objection to the form of the question.
MR. FABRIZIO: Objection. It's vague and confusing.
MR. PAGE:
Q. Did you understand the question?
A. I'm not sure I did.
Q. Let me rephrase it, then.
Is it your understanding that in the course of conducting searches, the Grokster application sends messages out of the Internet to supernodes?
A. Yes.
Q. Do you know whether the content of those messages sent in the course of searching for content is encrypted?
A. Talking about the metadata or the content?
Q. The entire content of the message sent by the Grokster application out to initially a supernode.
A. I'm not sure. I'm not sure.

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Q. If in fact it were encrypted, how would you go

about applying a filter to differentiate between requests for infringing and noninfringing content?
A. I could simply look at the shared list, the content with its metadata itself, which is readable by a nonencrypted fashion, and do my filtering at that level, which is almost outside the application. If I could affect what the application had access to, I could effect the filtering function.
Q. Perhaps my question was unclear. I was asking about when the application sends a search request out to the rest of the world, not when it responds to a search request coming in.
MR. KENDALL: I'll object to the form of the question. I don't know what you're asking. You're asking him to assume that a search request from the individual point of the supernode is encrypted; is that right?
MR. PAGE: That's correct.
MR. KENDALL: Could you restate the question after that.
MR. PAGE:
Q. I'm asking whether you believe it would be possible to apply a filter to that search request that could differentiate between a request for infringing and

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noninfringing content.
A. There's two things: If it's not encrypted and if I could read the file name, then the answer would be, I could imagine a way to do it.
Moreover, if you are only talking about the act of transmission, once that file has been put on a list of accessible files that I want to pass up to the supernode and it was encrypted, it may be more difficult.

I might be able to stop it even before that stage, before that became eligible to be passed up to the supernode.

Q. One of us isn't getting it. It's probably me.

User sits down with a copy of Grokster. He types in a search term. Nothing to do with any files on his computer. He types in Frank Sinatra. Assuming that the transmission of that search term out to the supernode is encrypted, is it your testimony that it would be possible to apply a filter to that search term to differentiate between requests for infringing and noninfringing content?

MR. FABRIZIO: I'll object. It's ambiguous.

THE WITNESS: Maybe the ambiguity is part of the problem. What I would do -- and, again, you're asking me to try to invent the design on the fly, which is very -- what shall I say. It's not a total thought. I

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would try to capture the request when it was still in clear form as input by the user and not pass that request to the Grokster client at all. I would try to intercept it before it got into the message packaging function, which would then -- encrypted or not, and send it out. I would try to get it to code before that. That's the way I would implement it.

MR. PAGE:

Q. I see. So put a wrapper around the Grokster application that would filter what the user was trying to do with it?

A. That's one way to think about it. Depends where that wrapper is and where the definition of the Grokster software is. I'm reaching into the Grokster search field, inside the application or not. You can

argue that it is.

Q. I assume based on what system resources it's called?

A. Yes. Do I get to patent this invention?

MR. FABRIZIO: I don't think they will be using it.

MR. PAGE:

Q. But we will call you first.

We sort of got off on a frolic there.

Go back to our detour. Going back to page 2 of your declaration, we were looking at Paragraph 3(c).

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Let me try a different hypothetical. Assume today I turn over Grokster, the organization, in its entirety to you. Do you have access to all the servers that Grokster currently has? You're running it now.

What would you do to enable the Grokster clients in the world to differentiate between authorized and unauthorized content? Put another way, what can Grokster do?

MR. KENDALL: Objection to the form of the question.

THE WITNESS: What I would try to do if I were seeking to stop -- differentiate the traffic would be to install filters of one sort or another, subject to a proper design, and have the client software upgrade to that new version and implement that functionality, and that's one.

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MR. PAGE:

Q. Is that based on the assumption that you have access to the source code for the Grokster client?

MR. KENDALL: Objection to the form of the question.

The reason for my objection is that there's so many assumptions built into that I don't know how the witness can answ[illegible]ne may take a swing.

MR. PAGE:

Q. Swing away.

A. I'll go back to what I said earlier. Even if I don't have the source code, I would access the files that the client had and put the filters -- as you said before, wrapper -- I'd put the filter at that point.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, v. GROKSTER, LTD., et al., Defendants.	Case No. CV 01 08541 SVW (PJWx) (Consolidated with CV 01 09923 SVW (PJWx))
[Filed Oct. 15, 2002]	

DECLARATION OF DR. INGRAM OLKIN IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY

I, DR. INGRAM OLKIN, the undersigned, declare:

1. I am currently a Professor of Statistics and Education at Stanford University, and have been retained by the Plaintiffs in this action as an expert witness. I make this declaration in opposition to Defendants' motions for summary judgement.

Background and Qualifications

2. My academic background is a Bachelor's degree in mathematics from the College of the City of New York in 1947, a Master's degree in mathematical statistics from Columbia University in 1949, and a Doctorate in theoretical statistics from the University of North Carolina, Chapel Hill. From 1951 to 1960 I served on the faculties of Michigan State University and the University of Minnesota, and from 1961 to the present, on the faculty of Stanford University.

3. I have been Chair of the Department of Statistics at Stanford University and the University of Minnesota. I am the recipient of a Guggenheim Fellowship; an Alexander von

Humboldt Senior Research Fellowship; a Lady Davis Fellowship at Hebrew University; and an Overseas Fellowship, Churchill College, Cambridge. I have received an Honorary Doctor of Science degree from DeMontfort University, England, as well as the Wilks Medal from the American Statistical Association. I have received a Lifetime Achievement Award from the American Psychological Association, and have been elected a Fellow of major statistical societies. I have served on numerous governmental panels and committees including the National Science Foundation, National Institutes of Health, National Center for Education Statistics, Bureau of the Census, and National Research Council of the National Academy of Sciences.

4. My field of statistical expertise is in statistical inference, statistical models in the social and behavioral sciences, multivariate statistical analysis, and methods for combining information. I have written papers on sampling methods, have edited three books on survey methods and have taught courses in this area. I have authored or edited numerous books and over 150 scientific papers. My curriculum vitae and bibliography, which includes a listing of all my published papers, is attached as Exhibit 1.

Scope of Work

5. I was asked by counsel for the Plaintiffs to design and implement a sampling protocol that would allow one to draw fair conclusions about, and to provide an opinion on, what percentage of files made available by users of the FastTrack system for copying are copyrighted works that are not authorized for distribution and copying on the FastTrack system.

Summary of Conclusions

6. Based on the sampling that I directed I have concluded that almost 90% of the files distributed by FastTrack users are infringing or likely infringing copies of commercially released copyrighted works and at least 75% of the files infringe the copyrights of Plaintiffs in this action.

Discussion of the Sampling Protocol

7. In order to create any sampling procedure, the sample should be representative of the population and not give undue weight to an "item." An item might be a particular type of file, an individual, and so on.

8. A second aspect is the determination of the size of the sample to be taken in order to provide with 95% confidence a margin of error that is no greater than 3%, which is a standard used, for example, in opinion polls. To accomplish this accuracy, standard statistical methodology yields a required sample size of 1067 items. A larger sample size would provide an even smaller margin of error, and accordingly, to be conservative, I used the figure of 1600 items.

9. The basis for the sampling procedure that I used is what is called "simple random sampling." In such a sampling procedure, each item has the same opportunity to be chosen as does every other item. Thus, for example, the choice of a random hour during a 24-hour day is obtained by labeling tickets from 1 to 24 and drawing one ticket from an urn. This is the mode of a lottery. However, it is more efficient to have a computer provide the draws instead of actually drawing tickets from an urn, and there currently exist a number of algorithms that provide for simple random sampling. Accordingly, all sampling of the data taken from the FastTrack system was performed using an algorithm.

10. After we generated the population of material, the files were sent to other persons for a copyright analysis. Specifically I understand that the information was sent to persons at the Recording Industry Association of America (RIAA), persons at the Motion Picture Association (MPAA), persons at the Harry Fox Agency ("HFA"), and persons at the National Music Publishers' Association (NMPA) to determine copyright ownership of the files set forth in the data. I have drawn my conclusions based upon the information obtained as a result of that analysis. I did not independently perform such analysis. For purposes of my conclusions I assume reasonable accuracy of that analysis.

11. For the purposes of this project, the FastTrack system was accessed using Grokster user software. In order to use that software, a "word" is required. The term word is not well defined. It could be (1) the name of a performer, (2) the name of a song, (3) a meaningless set of letters, or (4) an actual word taken from the dictionary. We decided not to employ method (3), that is, meaningless letter combinations, on the assumption that this procedure would not replicate how FastTrack users typically search. Methods (1) or (2), moreover, could generate some bias in that they would guide the result obtained, for example, known songs by known artists. Thus, for example, the name of a popular performer would be expected to yield an overestimate of usage of that performer's works. In order to avoid such a bias we chose method (4) and randomly sampled words from an electronic dictionary.

12. To choose a word, a letter was chosen in proportion to its frequency in the English language. Given a letter, words were then chosen at random from the Random House Unabridged Electronic Dictionary. In this way, we generated a list of 600 random words to use to conduct searches.

13. The searches were conducted through the Grokster user software without any change to its default settings. Each search resulted in a list of users and file names. (If a particular word returned no results, the next word was entered.) We used the results of these random searches to identify individual FastTrack users. Then, the files that each user was offering through the FastTrack system at that time were also captured. (If this list was unavailable for some reason, a new search term was entered and the process was repeated.) This procedure was repeated until the list of 600 random words was exhausted.

14. The outcome of this procedure led to the collection of approximately 31,647 file names which constitutes the sampled population. It was now required to choose a subsample of 1600 files that would be actually downloaded from the FastTrack system.

15. There are a variety of methods to choose a subsample from a larger sample. One such method is to list the items in the larger sample in all possible orders, thereby giving equal weight to every ordering of the items. Once this is done we choose a single ordering at random, and then choose the first number of elements for the subsample. This method is called a random permutation procedure, and is readily carried out by computer. To accomplish this, a random permutation was generated from which the first 4000 file names were candidates to be downloaded to comprise the final subsample of 1600 files. The files associated with each file name was then attempted to be downloaded until 1600 files had been downloaded. Henceforth, for the purposes of this discussion, the word sample will actually refer to the subsample, when appropriate.

Conclusions and Findings

16. I have concluded the following based on my review of the data collected as set forth above:

(a) 1201 files, or 75% of the files in the sample, are copyrighted works that are owned or controlled by the Plaintiffs in this action and are distributed and copied over the FastTrack system without permission.

(b) 234 files, or 15% of the files in the sample, consist of works that are likely copyrighted and are distributed and copied over the FastTrack system without permission of the rights holder, based on the preliminary analysis of RIAA/MPAA/ HFA/NMPA, but sufficient information was not available to allow for definitive confirmation in the available time.

(c) 1435 files, or almost 90% of the files in the sample, are or are likely copyrighted works that are made available for distribution and copying over the FastTrack system without permission of the rights holder.

17. The sampling procedures adhered to, in my opinion, indicate that the sampled files and users are representative of the FastTrack system. Therefore, I am able to conclude that copyright infringement appears to be a central and dominant part of the FastTrack system.

I declare that the foregoing represents my opinions and conclusions under penalty of perjury.

Stanford California
October 14, 2002

/s/

Ingram Olkin, Ph.D.